

The Future World of Work

Global Guide on Employment Implications of the COVID-19 Vaccination



The rollout of COVID-19 vaccines around the world has inevitably prompted a number of questions from businesses, such as whether they can require their staff to have the vaccine as part of their making the workplace as safe as practicable, and what their options are if an employee refuses to have it.

In this guide, we set out the key questions that employers are likely to have about the COVID-19 vaccine and the implications for the workplace. Lawyers from our Labour & Employment team have provided outline answers to these questions for their particular jurisdiction. As will be seen from the responses, approaches still differ from country to country – businesses should, therefore, continue to keep abreast of developments in the different countries that may affect them – a one-size-fits-all approach across your international network is definitely not recommended.

Please note that this guide is intended as a high-level overview only and should not be regarded as a substitute for legal advice. It sets out the position as at 23 September 2021.

We recommend that you always check the latest position with your local labour & employment lawyer. Where “✓/✗ Maybe” responses are given, they may be dependent on the facts and specific advice should always be taken.

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What is the latest position concerning the rollout of the vaccine?

The rollout of the vaccine has commenced. More information is available [here](#).

Has the Australian government made it mandatory to have the vaccine?



A national vaccination policy for Australia was endorsed by the National Cabinet (federal leadership and state premiers) on 13 November 2020. For individuals seeking to enter/re-enter Australia from abroad, it will be compulsory to present a valid vaccination certificate when boarding the aircraft/vessel. If this is not done, the individual will be required by law to spend 14 days in monitored hotel quarantine (not self-isolation) at their own/their employer's expense.

For individuals within Australia, a COVID-19 vaccination will not be mandatory but strongly encouraged, and there will be a national system to monitor immunisation levels and individual vaccination status. However, state and territory governments may make public health orders mandating the vaccine for workers in high-risk workplaces. For instance, New South Wales recently issued a public health order mandating the vaccine for all employees in aged care facilities, the first dose by 17 September 2021 and the second dose by 26 November 2021. The West Australian government has issued a public health order making the vaccine mandatory for all workers in public and private hospitals on a phased basis with the final date being 1 January 2022.

Can employers implement a “no job, no job” policy?

Maybe

Australian employers are increasingly moving to mandate vaccination for employees. The justification provided is that employers have a statutory duty to provide a safe workplace and working conditions that do not expose workers to hazards, and that they have a duty to the community on two fronts. The first is to ensure that unvaccinated employees do not infect members of the public and the second is to enable the health authorities to reduce the severity of lockdowns. Large Australian employers such as Qantas and Telstra have either completed or commenced the consultation phase that will lead to compulsory vaccination.

The legal justification is that if the vaccine is proved to be safe and effective, it is likely that a direction to a worker to be immunised will be held to be a lawful and reasonable direction. This is further elaborated in the following question where we consider the employee's refusal to have the vaccine.

In terms of new hires, on the basis that they would not have the right to claim unfair dismissal, it will be less of a legal risk for the employer to refuse to hire on the basis of vaccination status. It will still be open to the unvaccinated applicant to claim unlawful discrimination. The employer's defence would be that it was an inherent requirement of the job that was on offer.

Would it make any difference if the employee/applicant said they could not/would not have the vaccine because of their religious beliefs or because they had a condition that amounted to a disability under discrimination legislation?

Maybe

It would make a difference only if the disability were medically proven, and it was proven that the harm or risk of harm to the employee caused by the vaccine outweighed the need to keep the workplace safe and free from hazard for the majority, or, alternatively, that the employer had considered all practicable options to keep the workplace safe, and immunisation of all employees was the only option.

Will employers be able to arrange for the vaccination of their own staff?

Maybe but not initially

At the moment, it is not clear if or when employers will be able to access one of the approved vaccines for use with their own staff.

Will employers be obliged to ensure their staff get vaccinated? Maybe

There is no specific statement on this issue, but all employers are obliged to do what is reasonably practicable to provide safe workplaces that are free from hazard. As mentioned above, employers are obliged to ensure their staff get vaccinated where public health orders are in place for the specific high-risk workplace.

Would an employee's refusal to have the vaccine constitute an unreasonable failure to comply with a reasonable management request? Maybe

The criteria underpinning the meaning of lawful and reasonable directions given by an employer are objective and are discussed above. An additional criterion is whether immunisation against COVID-19 was an inherent requirement of the job. If it were, this would undercut any suggestion that termination of an employee who declined was unlawful discrimination.

Recent decisions in the Fair Work Commission have held that those employers operating in higher risk industries (childcare and aged care) were justified in dismissing their employees after they refused a lawful and reasonable direction to receive a flu vaccination. The employer's direction was in each case found to be lawful and reasonable in the absence of compelling medical evidence that vaccination in the case of the dismissed employee was contraindicated.

Should employers check employees' vaccination status before allowing them into the workplace? Maybe
but not
initially

There is currently no statutory obligation on employers to do this – although (as above) this will change for anyone working in aged care when new health orders come into force requiring them to be fully vaccinated unless medically exempt.

It is accepted medical wisdom that being vaccinated reduces the risk of your passing the COVID-19 virus to anyone else, and, therefore, there are good arguments that knowing whether someone is vaccinated is a necessary precursor to assessing the health and safety risks in your workplace and hence the level of precautions you should be taking. However, merely asking for information about an employee's vaccination status raises a number of employment issues for employers to consider and so should not be done lightly. Employers should take care not to discriminate unlawfully between vaccinated and non-vaccinated employees unless being vaccinated is an inherent requirement of the position.

Is there provision for a "vaccination passport" in Australia and, if so, can employers ask employees to show that before allowing them into the workplace? Maybe

At this stage, there is discussion in Australia about a vaccination passport. It has not yet been formally introduced.

As the vaccination passport has only been considered at this stage for access for commercial purposes, i.e. shops, pubs, theatres and sports grounds, there is no guidance available for using it in an employment context. Having said that, there is nothing expressly stating that employers cannot ask for this information from their employees, and sight of such a "passport", if offered, can be relied upon by the employer as evidence of vaccination status at that point in time.

Can employers refuse entry to the workplace if an employee refuses to have the vaccine?



In high-risk workplaces

On the basis of the Australian government's policy on those entering or re-entering Australia and the employer's statutory duty to provide a safe workplace, such a refusal, which will eventually lead to termination if the worker cannot work remotely, is likely to be upheld, subject to medical evidence supporting the exclusion as reasonably practicable.

Can a client refuse to allow our staff on its premises/to work alongside its own employees unless our staff have had the vaccine?



In high-risk workplaces

Ultimately, this would be the client's decision and it is possible that some businesses may adopt this approach. In such circumstances, it would be advisable to discuss with the client its concerns, the contractual terms between the parties (how far denial of access may interfere with your ability to provide the goods or services contracted for), whether this presents an issue for any of your staff, whether its concerns could be mitigated by alternative measures, e.g. regular testing of your staff, etc.

There are also privacy issues to consider in terms of being able to share this information with the client, as it concerns identifiable individuals. You should separately ensure you consider your own health and safety/employment law obligations when it comes to deploying your staff to client sites, which may include understanding how far the client has required its own staff to be vaccinated and the other precautions it has taken.

Are there data protection/privacy considerations in relation to this?

Maybe

The inclusion of an individual's immunisation details in the federal MyHealth record would be lawful, as it would have the individual's consent.

Are there any other issues that employers should consider in relation to this issue?



It is essential in any safe and healthy workplace for there to be formally recognised channels of communication, both upwards and downwards, so that every worker understands why and how the employer intends to keep the workplace safe and free from hazard.

Is there any guidance available for employers?



The Department of Health has provided some guidance to employers on implementing occupational vaccination programmes for people at occupational risk. This might include healthcare workers, childcare workers, laboratory workers or people who work with animals.

The Department of Health has recommended that if workers have a "significant occupational risk of acquiring a vaccine-preventable disease", the employer should implement a comprehensive occupational vaccination programme, which might include:

- A vaccination policy
- Current staff vaccination records
- Information about relevant vaccine-preventable diseases
- A policy for managing vaccine refusal

The Department of Health also recommends that employers should take "all reasonable steps to encourage non-immune workers to receive the recommended vaccines".

In addition, the FairWork Ombudsman provides up-to-date guidance on workplace rights and obligations regarding the COVID-19 vaccine, which is available [here](#).

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What is the latest position concerning the rollout of the vaccine?

Vaccination is happening at a different pace in Brussels compared to the rest of the country. In the Brussels region, the vaccination rate is dramatically low, such that COVID-19 measures (including those applicable to employers), remain stricter in the Brussels region.

Has the Belgian government made it mandatory to have the vaccine?

No.

Can employers implement a “no jab, no job” policy?

No. Although a minority of legal scholars have defended the possibility of such a policy, the Ministry of Employment and UNIA, the National Centre for Equal Opportunities and Opposition to Racism, have taken the position that such a policy would be unlawful and discriminatory.

Would it make any difference if the employee/applicant said they could not/would not have the vaccine because of their religious beliefs or because they had a condition that amounted to a disability under discrimination legislation?

No, there is already no right to require employees to have the vaccine irrespective of religious beliefs or any other reason.

Will employers be able to arrange for the vaccination of their own staff?

Vaccinations will be organised by the Belgian state authorities only.

Will employers be obliged to ensure their staff get vaccinated?

No, there will be no such obligation placed on employers. However, in certain cases (where the employee is exposed to the virus to a greater extent than the general population), the employer is required to give employees the possibility of being vaccinated.

Would an employee’s refusal to have the vaccine constitute an unreasonable failure to comply with a reasonable management request?

No.

Should employers check employees’ vaccination status before allowing them into the workplace?

No. In fact, the Ministry of Employment has ruled that employers cannot do this. Furthermore, even if (most) employees are vaccinated, companies should still take all appropriate prevention measures to ensure compliance with the rules of social distancing and provide the maximum level of protection. The appropriate prevention measures are described in the “Generic guide to combating the spread of COVID-19 at work”. All employees are required to observe the preventative measures in order to protect their health and that of their colleagues by following the instructions of the employer.

Is there provision for a “vaccination passport” in Belgium and, if so, can employers ask employees to show that before allowing them into the workplace?

The vaccination passport has indeed been introduced, but as per the Ministry of Employment’s guidance (see below), employers may not ask employees to show the passport before allowing them into the workplace.

Can employers refuse entry to the workplace if an employee refuses to have the vaccine? 

No, such a refusal would qualify as obstructing the employee to perform his/her duties, which could in turn qualify as a constructive dismissal.

Can a client refuse to allow our staff on its premises/to work alongside its own employees unless our staff have had the vaccine? Maybe

Ultimately, this would be the client's decision and it is possible that some businesses may adopt this approach. In such circumstances, it would be advisable to discuss with the client its concerns, the contractual terms between the parties (how far denial of access may interfere with your ability to provide the goods or services contracted for), whether this presents an issue for any of your staff, whether its concerns could be mitigated by alternative measures, e.g. regular testing of your staff, etc.

There are also data protection issues to consider in terms of being able to share this information with the client, as it concerns identifiable individuals. You should separately ensure you consider your own health and safety/employment law obligations when it comes to deploying your staff to client sites, which may include understanding how far the client has required its own staff to be vaccinated and the other precautions it has taken.

Are there data protection/privacy considerations in relation to this? 

Yes.

Information about who has (or has not) been vaccinated and when (or why not) will constitute special category data. The processing of this type of data is, in principle, forbidden, unless there is a specific exemption to rely on. The Belgian Data Protection Authority has ruled that employers do not have such a ground to rely on (similar to the position they have taken on temperature checks as a measure to protect against COVID-19).

Are there any other issues that employers should consider in relation to this issue? 

See our answer to the first question above concerning rollout of the vaccine in Belgium.

Is there any guidance available for employers? 

The Ministry of Employment has useful [guidance](#) on the topic, although the stance taken by the Ministry is rather strict. The Data Protection Authority has also issued [guidance](#).

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What is the latest position concerning the rollout of the vaccine?

China's National Health Commission recently reported that it has fully vaccinated 1 billion of its 1.41 billion citizens against COVID-19.

Has the Chinese government made it mandatory to have the vaccine?



No. The State Council spokesperson recently confirmed that vaccination is voluntary. We are not aware of any proposals to make vaccination mandatory in the near future. However, anyone travelling to China must be vaccinated.

Can employers implement a “no jab, no job” policy?



No, as it is not mandatory to have the vaccine.

Would it make any difference if the employee/applicant said they could not/would not have the vaccine because of their religious beliefs or because they had a condition that amounted to a disability under discrimination legislation?

Maybe

Employers cannot force employees to have the vaccine and cannot treat employees differently because of their vaccination status.

Will employers be able to arrange for the vaccination of their own staff?



No. Vaccination is being provided by the government and is free.

Will employers be obliged to ensure their staff get vaccinated?



No. Employers can take steps to encourage employees to get vaccinated but there is no obligation on employers to do so.

Would an employee's refusal to have the vaccine constitute an unreasonable failure to comply with a reasonable management request?



No, as vaccination is voluntary.

Should employers check employees' vaccination status before allowing them into the workplace?



No.

Is there provision for a “vaccination passport” in China and, if so, can employers ask employees to show that before allowing them into the workplace?



Each province has its own app for people to download onto their mobile phones. For those who have been vaccinated, the app will show their vaccination status (when, where and what vaccination they received). However, employers cannot ask employees to show their vaccination record before allowing them to access the workplace. There is another app, which shows if the individual has travelled to a medium risk or high risk area in the last 14 days and whether the individual has had a fever in the last 14 days (“health code”/“travel code”). Employers can ask individuals to show their health code/travel code before entering the workplace.

Can employers refuse entry to the workplace if an employee refuses to have the vaccine?



No.

Can a client refuse to allow our staff on its premises/to work alongside its own employees unless our staff have had the vaccine?



We are not aware of any rules requiring employees in certain businesses/industries to take the vaccine. On that basis, a client would have no grounds to refuse access to its premises to any employee who has not had the vaccine.

Are there data protection/privacy considerations in relation to this?



No.

China

Are there any other issues that employers should consider in relation to this issue? 

Employers should continue to follow any government guidance/requirements on COVID-19 issues.

Is there any guidance available for employers? 

Some guidance was issued back in March/April 2020, but as China has been back to normal for the most part, most provisions of the guidance are no longer strictly enforced in practice. Employers would be well advised to keep a close eye on government communications through the local news and media briefings from the government.

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What is the latest position concerning the rollout of the vaccine?

Vaccinations commenced in December 2020. For more details on the vaccination phases, see below.

Has the Czech government made it mandatory to have the vaccine?

Vaccination will be voluntary and covered by public health insurance.

The Czech Republic has adopted a new Act on COVID-19 vaccine distribution. The fact that the vaccine is voluntary and discrimination against unvaccinated people is prohibited, something that was intensively discussed during the legislative process, is not explicitly stated in the Act. Government representatives have, however, repeatedly confirmed that vaccination is voluntary.

Can employers implement a “no jab, no job” policy?

Since vaccination is not mandatory in the Czech Republic (yet), an employer cannot order its employees to get vaccinated. Thus, not being vaccinated is not a ground for dismissal.

In terms of new hires, according to the Labour Code, an employer cannot request information from an employee that is not directly related to the performance of the job. Therefore, questions about, among other things, health status (i.e. being vaccinated) are in the vast majority of cases unacceptable to ask in job interviews; decisions based on such criteria could be considered discriminatory. There may be some rare exceptions, such as medical facilities where a specific approach and consideration should be adopted.

Would it make any difference if the employee/applicant said they could not/would not have the vaccine because of their religious beliefs or because they had a condition that amounted to a disability under discrimination legislation? Maybe

According to case law from the Czech Constitutional Court, an individual can object to mandatory vaccination on religious (or even secular) grounds. This exception, however, only applies in exceptional cases and must be closely linked to the individual that is required to have the vaccination, e.g. because the individual has had a highly undesirable response to a previous vaccination.

Will employers be able to arrange for the vaccination of their own staff? Maybe

According to the government's [vaccination strategy](#) and the related [methodological guidelines](#) (last updated on 17 June 2021), vaccination will take place in several phases. Currently, the Czech Republic finds itself in the second phase where vaccination is decentralised and open to all groups of the population.

Vaccinations are performed by hospitals and vaccination centres, general practitioners and other providers of health services (including doctors providing occupational health services at workplaces). So far, it is not expected that the vaccine will be commonly available in a pharmacy and it will be possible to obtain it only from a doctor who will apply it directly. It has been agreed with the government that companies and their occupational health service providers can arrange for vaccinations.

Will employers be obliged to ensure their staff get vaccinated? Maybe

So far, there is no specific and express obligation on employers to ensure their staff get vaccinated. As a minimum, employers should encourage their employees to get the vaccination and provide their employees with relevant information.

In relation to the specific circumstances mentioned above concerning mandatory vaccination, such an obligation may arise on the basis of the employer's health and safety obligations. An employer is obliged to ensure the occupational health and safety protection of employees at work with regard to risks that might endanger their life and health during the performance of their duties. If there is a high risk that employees would be directly exposed to the COVID-19 virus, the employer might be obliged to ensure vaccination.

Would an employee's refusal to have the vaccine constitute an unreasonable failure to comply with a reasonable management request?

Maybe

No, as the vaccine will most likely not be mandatory and employees will not be subject to such an obligation. Without a legal requirement for mandatory vaccination, employers cannot force employees to be vaccinated.

In relation to the specific circumstances referred to above concerning mandatory vaccination, it is possible that such a refusal may constitute a failure to comply with a reasonable management request, but the reasonableness of the request would have to be assessed on the facts of each individual case. Risks arising in the workplace and the employer's interest in protecting the health of its employees should always be weighed against each employee's right for personal integrity and his/her personal freedom. As explained above, vaccination can be ordered by the employer only in specific circumstances.

Should employers check employees' vaccination status before allowing them into the workplace?



Employers cannot require employees to disclose whether they have been vaccinated or not.

Is there provision for a "vaccination passport" in the Czech Republic and, if so, can employers ask employees to show that before allowing them into the workplace?



As a member of the European Union, the Czech Republic has adopted the Digital Covid Certificate. However, its use is primarily for free time and travel purposes. Since at the moment the employer has no right to request information about employees' vaccination status, the use of the certificate in workplace situations is not really applicable.

Can employers refuse entry to the workplace if an employee refuses to have the vaccine?



In general, an employer may refuse an employee entry to the workplace and send the employee home for any reason, including health and safety concerns, but the employee must receive full pay (as this is considered to be an obstacle on the employer's side).

It is recommended that employers try and reach agreement with the employee first. For example, an agreement about working from home (if applicable) could be entered into with the employee.

In relation to the specific circumstances mentioned above concerning mandatory vaccination, if an employer's request to vaccinate was considered reasonable, the employee could be considered unfit to perform work and the employment relationship with this employee could possibly be terminated.

Can a client refuse to allow our staff on its premises/to work alongside its own employees unless our staff have had the vaccine?

Maybe

Ultimately, this would be the client's decision and subject to the contractual terms between the parties. Employers are responsible for the health and safety of their employees in the workplace. Therefore, some employers may assess the presence of unvaccinated individuals on their premises as a health risk and adopt this approach. In such circumstances, it would be advisable to discuss with the client its concerns, the contractual terms between the parties (how far denial of access may interfere with your ability to provide the goods or services contracted for), whether this presents an issue for any of your staff, whether its concerns could be mitigated by alternative measures, e.g. regular testing of your staff, etc.

There are also data protection issues to consider in terms of being able to share this information with the client, as it concerns identifiable individuals. You should separately ensure you consider your own health and safety/employment law obligations when it comes to deploying your staff to client sites, which may include understanding how far the client has required its own staff to be vaccinated and the other precautions it has taken.

Are there data protection/privacy considerations in relation to this?

Information about whether a person has or has not been vaccinated would constitute special category personal data pursuant to Article 9 of the GDPR. A valid ground for processing could be the legal obligation of the employer (as the controller) or for the purpose of preventative or occupational medicine. Employees must be duly informed about the processing.

A data protection impact assessment might need to be carried out by the employer (as the controller) if data concerning health is being processed on a large scale.

No guidance has yet been issued by the Czech Data Protection Authority.

Are there any other issues that employers should consider in relation to this issue?

No.

Is there any guidance available for employers?

Not currently.

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What is the latest position concerning the rollout of the vaccine?

The first vaccine was given on 27 December 2020. Vaccination is now open to all adults unconditionally and teenagers aged 12 to 17 inclusive.

Has the French government made it mandatory to have the vaccine?



The President declared during his speech on 24 November 2020 that vaccination would not be mandatory.

The High Authority of Health (French "HAS") also stated that it was not recommending that vaccination be made mandatory, whether for the general population or for health professionals.

However, mandatory vaccination has now been introduced by Law n° 2021-1040 of 5 August 2021 for health professionals. There is a detailed list setting out which individuals must be vaccinated.

People with certain health conditions will be exempt from mandatory vaccination.

Unvaccinated staff had until 15 September 2021 to get vaccinated or until 15 October 2021 if they have already received a first dose of the vaccine and if they present a negative COVID-19 test.

Controls have been in operation since 15 September 2021.

The HAS now considers that mandatory vaccination for health professionals in contact with vulnerable people is justified. It also recommends considering mandatory vaccination for the entire population.

Can employers implement a "no job, no job" policy?



No. It is not possible to dismiss employees if they are not vaccinated, even if the obligation to be vaccinated applies to them.

Individuals who are subject to mandatory vaccination but who have not been vaccinated on time, may have their contracts suspended without pay.

If the situation continues for more than three working days, the unvaccinated employee will then be called for an interview to consider reclassification, even if only on a temporary basis.

Non-compliance with mandatory vaccination is sanctioned by a ban on practicing their profession.

If these individuals do not comply with this ban, the sanction is a fine of €135.

Employers that do not control the vaccination status of their staff could be sanctioned by a fine of €1,500. A third instruction by the authorities within a 30-day period could be sanctioned by one year of imprisonment and a fine of €9,000.

It is, however, not possible to dismiss employees if they are not vaccinated, as initially proposed by the government.

Would it make any difference if the employee/applicant said they could not/would not have the vaccine because of their religious beliefs or because they had a condition that amounted to a disability under discrimination legislation?



No. With regard to individuals who are subject to mandatory vaccination, it would also not make any difference if they refuse to have the vaccine because of their religious beliefs or for other reasons, except recognised medical conditions.

A decree, published after the opinion of the HAS, sets out the medical conditions exempt from mandatory vaccination (Decree n° 2021-1059 of 7 August 2021).

Will employers be able to arrange for the vaccination of their own staff?

Employers are encouraged to inform their employees about the possibility of being vaccinated by the company's occupational health service. The information must be communicated to all employees regardless of their age and must make it explicit that vaccination is voluntary and that it is part of the vaccination campaign established by the public authorities.

Employees benefit from an authorisation of absence to allow them to be vaccinated, without reduction of remuneration. This absence counts as working time for the duration of paid leave, as well as for the legal and collective agreement rights acquired with seniority.

Employers cannot receive any information on their employees' vaccination status, nor on whether they accept or refuse the vaccine, except in circumstances where vaccination is mandatory.

Will employers be obliged to ensure their staff get vaccinated?

In some cases

Employers will be obliged to ensure their staff get vaccinated if their staff are subject to mandatory vaccination.

Employers that do not control the vaccination status of their staff could be sanctioned by a fine of €1,500.

A third instruction by the authorities within a 30-day period could be sanctioned by one year of imprisonment and a fine of €9,000.

See above for further details.

Would an employee's refusal to have the vaccine constitute an unreasonable failure to comply with a reasonable management request?

No, an employee's refusal will not constitute a failure to comply with a reasonable management request.

It is not possible to dismiss employees if they are not vaccinated.

Should employers check employees' vaccination status before allowing them into the workplace?

Vaccination is mandatory only for some groups of employees.

Employers cannot check vaccination status before allowing other employees into the workplace. In fact, this is confidential medical information. Moreover, the law of 5 August 2021 specifies that requesting the presentation of the sanitary pass (see below) by a non-authorised person is punishable by one year's imprisonment and a fine of €45,000.

Is there provision for a "vaccination passport" in France and, if so, can employers ask employees to show that before allowing them into the workplace?

No, there is only a sanitary pass (vaccination, negative COVID-19 test and proof of COVID-19 recovery).

Can employers refuse entry to the workplace if an employee refuses to have the vaccine? ?

In some cases

The law of 5 August 2021 allows restrictions on access to certain places (including bars, cafes and restaurants) or activities and subject to presentation of the sanitary pass. To obtain the pass, individuals must have proof they are fully vaccinated, recently tested negative or recently recovered from the virus.

Since 30 August 2021, employees working in these places have been required to present one of the supporting documents mentioned above (sanitary pass). Otherwise, their contract will be suspended without pay.

Under French legislation, employers are responsible for the health and safety of their employees at the workplace, which means that the necessary measures must be taken in order to avoid potential risks created by such employees. Alternatives could be adopted, such as working from home if it is possible, social distancing, barrier measures, etc.

Can a client refuse to allow our staff on its premises/to work alongside its own employees unless our staff have had the vaccine? 

As a general rule, no, if vaccination is not mandatory.

Employers are responsible for the health and safety of their employees in the workplace. They should, therefore, consider their own legal obligations in this regard when deploying staff to client sites. For example, employers could request information about the precautions taken by the client or the sanitary measures implemented at the client's site.

Are there data protection/privacy considerations in relation to this? 

Yes, details about vaccination is personal information of the employee and is subject to the GDPR.

Are there any other issues that employers should consider in relation to this issue? 

As with most COVID-19-related issues (compulsory testing, the introduction of other safety measures in the workplace, etc.), employers should ensure they communicate with their staff representatives and employees, explain the rationale for their approach on vaccination, consider any feedback, etc.

It is possible for employers to launch their own COVID-19 vaccination campaign, as outlined above.

Is there any guidance available for employers? 

The Ministry of Labour published the [Q&A on vaccination](#) by occupational health services on 25 February 2021.

For more information on vaccination in France, please consult the site of the [High Authority for Health](#) or the regularly updated [government site](#).

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What is the latest position concerning the rollout of the vaccine?

Roughly 62% of the German population is vaccinated. The government has recently set up mobile vaccination centres to boost its immunisation drive.

Has the German government made it mandatory to have the vaccine?



No – vaccination is voluntary.

Can employers implement a “no jab, no job” policy?



According to the current legal situation, this would constitute a breach of GDPR provisions, as it involves the illegal processing of personal data. Asking about an employee’s or a candidate’s vaccination or recovery status and recording the answer constitutes the processing of personal health data. The processing of health data in the employment relationship is only permissible if it is necessary for the employer to exercise its rights or to comply with legal obligations under the employment relationship and if the employer’s interest in processing the health data outweighs the employee’s/the candidate’s interest in not having his/her health data processed. Under current German law, an obligation to provide information about vaccination or recovery status only exists for employees in the (health) care sector. The employee’s consent would not be a valid basis in this context.

As in other jurisdictions, this is a hot topic in Germany right now. But whether a legal basis for an employer’s right to information (at least in certain industries) will be created in the near future is unclear. Since the new parliament will be elected in Germany on 26 September, nothing concrete can be expected prior to the elections or shortly after.

Would it make any difference if the employee/applicant said they could not/would not have the vaccine because of their religious beliefs or because they had a condition that amounted to a disability under discrimination legislation?

Maybe

This is conceivable in individual cases, since both religion/belief and disability are characteristics under the General Equal Treatment Act (*Allgemeines Gleichbehandlungsgesetz*), according to which an employee may not be discriminated against.

Will employers be able to arrange for the vaccination of their own staff?



Yes. Since the beginning of June, employees have been able to be vaccinated directly by company doctors. According to the Federal Ministry of Health, at least 500,000 doses per week are planned to be vaccinated in companies. This is intended to make vaccinations faster and easier, since appointments do not necessarily have to be made at vaccination centres or local doctors.

Will employers be obliged to ensure their staff get vaccinated?



Probably not, since infection with COVID-19 will not be deemed to be an accident at work, as the risk of infection is a general risk due to its pandemic classification. Exceptions could be made for employees whose jobs expose them to a very high risk of infection. With an increased risk of infection, the employer’s duties of protection are greater.

Would an employee’s refusal to have the vaccine constitute an unreasonable failure to comply with a reasonable management request?



No, because there is not an obligation to be vaccinated for most employees.

Exceptions could be made for employees who come into contact with particularly vulnerable people (e.g. in geriatric care). If vulnerable people or their relatives demand vaccinated staff or if unvaccinated staff pose a high risk to vulnerable people, a refusal could even constitute grounds for dismissal for personal reasons if the employer cannot transfer the employee to another position.

Should employers check employees' vaccination status before allowing them into the workplace? ✘

No, since there is no justification for such a process at the moment. The vast majority of German employers currently do not need to know the vaccination or recovery status of their employees in order to determine occupational health and safety measures, and asking about it is, at least at present, impermissible under data protection laws. Exceptions apply for hospitals and care facilities.

Is there provision for a "vaccination passport" in Germany and, if so, can employers ask employees to show that before allowing them into the workplace? ✘

An individual's vaccination status can be proven either by the "classical" vaccination certificate or digital certificate. But as mentioned above, most German employers do not need to know the vaccination or recovery status of their employees in order to determine occupational health and safety measures and thus could not justify such a process. Exceptions apply for hospitals and care facilities.

Can employers refuse entry to the workplace if an employee refuses to have the vaccine? ✘

Generally no, as there is not an obligation to be vaccinated for most employees.

Can a client refuse to allow our staff on its premises/to work alongside its own employees unless our staff have had the vaccine? Maybe

This would be the client's decision, not least because it exercises occupiers' rights over its own premises.

With regard to the legal consequences of any refusal, this would depend on the type of business arrangement and the contractual terms between the parties. However, there are of course major data protection concerns, as the client would have to be provided with personal data about the employer's employees.

Are there data protection/privacy considerations in relation to this? Maybe

Asking about an employee's or a candidate's vaccination or recovery status and recording the answer constitutes the processing of personal health data. Thus, it is subject to the GDPR.

Are there any other issues that employers should consider in relation to this issue? ✔

We would generally recommend achieving a high vaccination rate among employees through the use of incentives. For example, the vaccine could be provided free or could be associated with other advantages for the employee.

Is there any guidance available for employers? ✘

Not yet.

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What is the latest position concerning the rollout of the vaccine?

The vaccine commenced in March 2021. More than 50% of Hong Kong's population has now been vaccinated.

Has the Hong Kong government made it mandatory to have the vaccine?

No. There is not technically speaking a mandatory requirement for all citizens to have the vaccine. However, the government has introduced rules that affect employees who are not vaccinated. For example, government employees who have failed to be vaccinated would need to undergo regular compulsory testing and pay for such tests themselves, unless the employees are unable to be vaccinated on medical grounds. The government has also relaxed the social distancing regulations on certain industries (e.g. restaurants) if employees are vaccinated. Individuals from certain jurisdictions are also not able to come to Hong Kong if they are not vaccinated.

Can employers implement a "no jab, no job" policy?

Currently, employers do not have any express statutory right to require employees to have the vaccine.

Some employers may argue that under the Occupational Safety and Health Ordinance and common law, they are required to take all reasonably practicable steps to ensure the safety and health of all employees, and this allows them to require employees to be vaccinated. The position remains untested, and it is possible that only employers in high-risk industries (e.g. medical institutions) may be able to require employees to be vaccinated.

The position has not been tested in the courts, but some employers are of the view that they can request employees to have the vaccine to enjoy the more favourable conditions of operation announced by the government (where applicable). In recent weeks, we have observed that there has been a gradual movement for more and more employers following the example of the government and requesting employees be vaccinated.

Would it make any difference if the employee/applicant said they could not/would not have the vaccine because of their religious beliefs or because they had a condition that amounted to a disability under discrimination legislation?

Religious beliefs are not generally speaking a protected characteristic under Hong Kong law. Some employees may be able to challenge the employer's decision on the ground of indirect disability discrimination.

Will employers be able to arrange for the vaccination of their own staff?

Currently, individual employees can register themselves to receive the vaccination through community vaccination centres and private doctors or clinics participating in the vaccination programme. Employers cannot technically speaking apply on their employees' behalf. Having said that, we note that some bigger companies have managed to negotiate with the government for vaccination to take place at the workplace.

Will employers be obliged to ensure their staff get vaccinated?

As of now, there is no law obliging employers to do so.

Would an employee's refusal to have the vaccine constitute an unreasonable failure to comply with a reasonable management request? Maybe

It depends on the circumstances.

Some employers may argue that under the Occupational Safety and Health Ordinance and common law, they are required to take all reasonably practicable steps to ensure the safety and health of all employees, and this may mean that the employee's refusal to have the vaccine constitutes a failure to comply with a reasonable management request. However, the position remains untested, and it is possible that only employers in high-risk industries (e.g. medical institutions) may be able to rely on such provisions. In recent weeks, there has been a gradual movement for more and more employers to follow the example of the government and request employees be vaccinated.

The position has not been tested in the courts, but some employers are of the view that they can request employees to have the vaccine to enjoy the more favourable conditions of operation announced by the government (where applicable).

Should employers check employees' vaccination status before allowing them into the workplace?



There is not generally speaking any such requirement under Hong Kong law, except for certain regulated industries in which the government requires employees to be vaccinated (or otherwise they would need to undergo regular testing).

Is there provision for a "vaccination passport" in Hong Kong and, if so, can employers ask employees to show that before allowing them into the workplace?



There is not a mandatory "vaccination passport" requirement under Hong Kong law. For certain regulated industries in which the government requires employees to be vaccinated (or otherwise they would need to undergo regular testing), employers can ask employees to provide such proof of vaccination.

Can employers refuse entry to the workplace if an employee refuses to have the vaccine?



Generally speaking unlikely, except perhaps for the high-risk industries as mentioned above.

The position has not been tested in the courts, but some employers are of the view that they can refuse entry to employees who refuse to have the vaccine, so as to enjoy the more favourable conditions of operation announced by the government (where applicable).

Can a client refuse to allow our staff on its premises/to work alongside its own employees unless our staff have had the vaccine?



It is possible that a client may request this. Having said that, there is the risk of an indirect discrimination claim against the client if the relevant employee has not had the vaccination due to medical issues.

Are there data protection/privacy considerations in relation to this?



Yes, information about who has (and has not) been vaccinated will constitute personal data that is protected under the Personal Data (Privacy) Ordinance. See comments below concerning practical steps to consider when dealing with such data.

Are there any other issues that employers should consider in relation to this issue?



All practicable steps (e.g. storing the data in a locked cabinet, encrypting the data and only allowing authorised personnel to have access to the data) should be taken by an employer to protect the personal data collected against unauthorised or accidental access, processing, erasure, loss or use. Adequate data security safeguards are particularly important for medical or health data because it is considered more sensitive and a breach of health data may cause significant harm to the individuals concerned.

Further, employers should permanently destroy the personal data collected for the purposes of fighting or combatting COVID-19 when the purpose of collection is fulfilled, such as when there is no evidence suggesting that any employees have contracted COVID-19 or have close contacts with the infected after a reasonable period of time.

Is there any guidance available for employers?



The COVID-19 Pandemic Guidelines for Employers and Employees published by the Office of the Privacy Commissioner for Personal Data, Hong Kong can be found [here](#).

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What is the latest position concerning the rollout of the vaccine?

Since 1 May 2021, all individuals aged 18 and above have been eligible to receive the COVID-19 vaccination.

Has the Indian government made it mandatory to have the vaccine?

No, the Ministry of Home Affairs has confirmed that vaccination will be voluntary for Indian citizens.

However, recent guidelines/orders/circulars issued by certain governments/local authorities in certain states provide guidance on the vaccination status of employees in relation to their presence in the workplace as follows:

- Tamil Nadu: Through guidelines dated 24 July 2021, the government of Tamil Nadu has directed all deputy directors of health services in the state to enforce certain preventative measures in workplaces to contain the spread of COVID-19. Such measures require deputy directors to ensure that all employees at the workplace and their family members are fully vaccinated.
- Maharashtra: Through an order that came into effect on 15 August 2021, the Maharashtra government has advised that employers of office and industrial establishments in Maharashtra must ensure that employees working at their establishments are fully vaccinated and can only return to the workplace 14 days after receiving a second dose of the vaccine. Employers must also keep a list of their employees' vaccination information if requested by the state authorities for inspection.
- Karnataka (specifically for the capital city of Bengaluru): Through a circular dated 26 August 2021, the local municipal authority for the city of Bengaluru has directed all employers of establishments in Bengaluru (Karnataka) to: (i) ensure regular testing of their staff; and (ii) ensure 100% vaccination of employees at the employer's cost. Further, employees should have received at least one dose of the vaccination by 31 August 2021, and employees should maintain proof of their vaccination status at the workplace and produce the same as and when enquired.

Can employers implement a “no job, no job” policy?

Possibly

Vaccination status is not an attribute protected by anti-discrimination legislation in India. Therefore, employers may implement a “no job, no job policy” in respect of new hires.

In respect of existing employees, given the lack of jurisprudence in relation to an employer's right to terminate an employee's services for refusal to be vaccinated (against the backdrop of the Ministry of Home Affairs, Government of India, clarifying that vaccination will be voluntary for Indian citizens), it is advisable that legal advice be sought prior to initiating any adverse disciplinary action such as termination of services of unvaccinated employees. Each case would need to be considered on its particular facts, and a blanket approach should not be adopted.

Would it make any difference if the employee/applicant said they could not/would not have the vaccine because of their religious beliefs or because they had a condition that amounted to a disability under discrimination legislation?

Possibly

As mentioned above, vaccination against COVID-19 is voluntary. If employees refuse to be vaccinated due to health, religious or other reasons (such as underlying health conditions), subject to the feasibility of the concerned employees working from home, an employer may take necessary measures to accommodate such employees and allow them to work from home to protect the larger workforce from the spread of the virus.

Will employers be able to arrange for the vaccination of their own staff?

Yes, the Indian Ministry of Health and Family Welfare has issued [Guidance on COVID-19 Vaccination at Workplaces](#), which describes the process to be followed by workplaces with 100 or more eligible (currently only persons of 18 years and above are entitled to receive the vaccine in India) and willing beneficiaries to set up COVID-19 vaccination centres at their workplace to inoculate employees on a voluntary basis.

Will employers be obliged to ensure their staff get vaccinated?



Possibly

Except in Tamil Nadu, Maharashtra and Bengaluru (as set out above), employers will not be obliged to ensure their staff get vaccinated.

However, as per recent industry practice, employers have been bearing such costs and have linked up with hospital and pathology laboratories for facilitating COVID-19 vaccination of employees.

Would an employee's refusal to have the vaccine constitute an unreasonable failure to comply with a reasonable management request?

Maybe

No, however, a refusal to have the vaccine by employees who work (or are required to work) at a physical premises in Tamil Nadu, Maharashtra and Bengaluru would constitute a failure to comply with the directions of the competent authorities and such employees may be restricted from accessing the workplace.

Should employers check employees' vaccination status before allowing them into the workplace?



Possibly

As set out above, in Tamil Nadu, Maharashtra and Bengaluru, employers have to ensure employees' vaccination status prior to allowing them into the workplace.

At all other locations, employers may require their employees, clients or contractors to disclose their vaccination status (and even provide proof of the same) on a voluntary basis, prior to entering the workplace. Alternatively, employers may request sight of the certificate and make a note of the vaccination status instead of seeking a copy of the vaccination certificate.

Is there provision for a "vaccination passport" in India and, if so, can employers ask employees to show that before allowing them into the workplace?

Maybe

The Indian government has expressed concerns regarding use of "COVID-19 passports" on the basis that the passport would be discriminatory towards developing countries that are recording lower levels of vaccination. As such, it is unlikely that India will implement the COVID-19 passport anytime soon.

However, to facilitate the process of citizens travelling to countries that require vaccination certificates, the Indian government has linked individuals' fully vaccinated status to their passport. Employers may, on a voluntary basis, ask employees to provide copies of their "vaccine passport" in circumstances where employees are required to travel overseas for business purposes. Since vaccine passports have been introduced at this stage for non-employment related reasons, there is no guidance available for using it in an employment context (such as proof for entering the workplace).

Can employers refuse entry to the workplace if an employee refuses to have the vaccine?



Yes, in Bengaluru, Maharashtra and Tamil Nadu, employers can restrict unvaccinated employees from entering the workplace. In other states/cities where similar guidelines/orders/circulars have not been issued, on the basis of an employer's duty of care to provide a safe working environment for its employees and to protect the larger workforce from contracting the virus, employers may restrict unvaccinated personnel from accessing the workplace and require such employees to work from home.

Can a client refuse to allow our staff on its premises/to work alongside its own employees unless our staff have had the vaccine?



Yes. As mentioned above, with a view to protecting employees working at the premises, an employer may issue necessary communications to unvaccinated employees/third-party personnel against entering the premises and working alongside its own employees.

Are there data protection/privacy considerations in relation to this?

Yes, information about who has (and has not) been vaccinated will constitute sensitive personal data and information as per Indian data privacy laws. Employers may, on a voluntary basis, obtain declarations from employees as to whether or not they have been vaccinated. Employee consent is required to collect, process, store and transfer such vaccination data. Additionally, reasonable security measures must be in place when storing and transferring such data.

Are there any other issues that employers should consider in relation to this issue?

Before issuing necessary communications restricting unvaccinated employees (i.e. employees who have not received even one dose of the COVID-19 vaccine) from the premises, employers should bear in mind that the COVID-19 vaccination drive in India picked up pace only towards the end of May 2021 and many individuals await the second dose of the vaccine on account of the mandatory intervening period of 84 days between the two doses (for the Covishield vaccine).

If the operational and business needs of the employer require unvaccinated employees to visit the workplace, employers may allow such employees to access the workplace by presenting a recently issued (not more than one week old) negative COVID-19 test result.

Is there any guidance available for employers?

Employers may refer to the detailed [Guidelines on Preventive Measures to Contain Spread of COVID-19 in Workplace Settings](#) and the [Standard Operating Procedure on Preventive Measures to Contain Spread of COVID-19 Virus in Offices](#).

Contact



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What is the latest position concerning the rollout of the vaccine?

The rollout commenced on 27 December 2020.

Has the Italian government made it mandatory to have the vaccine? ❌

As of now, the government has not imposed the vaccine on the entire population.

Can employers implement a “no jab, no job” policy? ❌

As a general rule, given that the vaccine has not been rendered mandatory for all workers, employers cannot implement a “no jab, no job” policy aimed at dismissing/not hiring unvaccinated employees.

Would it make any difference if the employee/applicant said they could not/would not have the vaccine because of their religious beliefs or because they had a condition that amounted to a disability under discrimination legislation? ❌

Since the vaccine has not been rendered mandatory for all workers, it would not make any difference if an employee refuses to have the vaccine because of his/her religious beliefs or for other reasons.

Will employers be able to arrange for the vaccination of their own staff? ✅

Pursuant to the recent national protocol for the implementation of company plans aimed at activating extraordinary COVID-19 vaccination points in workplaces, adopted by the most representative institutions and trade unions, employers may set up special vaccination points in the workplace for the administration of the vaccine to workers who have voluntarily requested it or enter into a specific agreement with external providers that meet the requirements for vaccination.

Will employers be obliged to ensure their staff get vaccinated? ❌

As a general rule, no.

Would an employee’s refusal to have the vaccine constitute an unreasonable failure to comply with a reasonable management request? ❌

Since the vaccine has not been rendered mandatory for all workers, an employee’s refusal will not constitute a failure to comply with a reasonable management request.

However, if the refusal is such that the health of other people is put at risk, in a worst-case scenario, such a refusal may constitute an obstacle to the continuation of the employment relationship.

Should employers check employees’ vaccination status before allowing them into the workplace? ❌

Pursuant to Italian law, and in particular to Article 5 of the Workers’ Statute, employers cannot carry out investigations on the clinical situation of their employees.



Is there provision for a “vaccination passport” in Italy and, if so, can employers ask employees to show that before allowing them into the workplace?



Law Decree no. 105/2021 has introduced the “Green Pass”.

The Green Pass is a certificate in digital and printable format, issued by the Ministry of Health’s national platform, which contains a QR Code through which it is possible to verify its authenticity and validity. The Green Pass is issued to the following categories of persons:

- Those who have had the vaccine
- Those who have tested negative to a molecular or rapid antigenic COVID-19 test within 48 hours
- Those who have recovered from COVID-19 in the last six months

By presenting the Green Pass, it is possible to overcome certain restrictions in the national territory, including attendance at events, entry into restaurants, museums or other public or private locations that are listed in the above-mentioned decree.

Important new development: According to plans published by the Italian government on 16 September 2021, starting from 15 October 2021 and until 31 December 2021, the Green Pass will be imposed as a mandatory requirement for all workers to access their workplaces.

Employees who do not have a Green Pass will be suspended from work with no right to compensation. Suspension of employees for this cannot lead to dismissal.

The Italian government has announced plans for a specific procedure aimed at allowing small companies (having fewer than 15 employees) to temporarily replace any suspended employees.

For further details on the changes see our alert [here](#).

Can employers refuse entry to the workplace if an employee refuses to have the vaccine?

Maybe

Pursuant to Italian legislation, employers are responsible for the health and safety of their employees at the workplace. As a consequence, they may be entitled to refuse entry to the workplace. It is likely that this issue will be regulated by means of a national protocol agreed with the most representative trade unions, as has been done during the first wave of the pandemic.

See comments above concerning the introduction of the Green Pass.

Can a client refuse to allow our staff on its premises/to work alongside its own employees unless our staff have had the vaccine?

Maybe

In light of the health emergency caused by COVID-19, employers may adopt measures to guarantee the health and safety of their employees. A refusal to allow unvaccinated people to enter company premises is a decision that rests with each employer.

Are there data protection/privacy considerations in relation to this?



Yes. The Italian Data Protection Authority (DPA) has recently confirmed that employers cannot process employees’ personal data relating to their vaccination status (both their intention to have or not have the vaccine administered and the actual administration).

In any case, according to the DPA, data concerning who has (and has not) been vaccinated constitutes a special category of personal data, subject to stringent GDPR law provisions.

Are there any other issues that employers should consider in relation to this issue?



As the vaccine has not been rendered mandatory for all workers, it is very likely that some employees will refuse to be vaccinated.

Employers may consider implementing an awareness campaign to encourage employees to have the vaccine.

Is there any guidance available for employers?



On 13 May 2021, the Italian DPA issued [guidelines](#) for employers relating to the processing of employees’ vaccination data from a data protection perspective.

Contact



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Has the rollout of the vaccine commenced?

At the moment, over 85% of Dutch adults have had their first jab and over 73% are fully vaccinated. All adults have had the opportunity to be vaccinated if they wish.

Has the Dutch government made it mandatory to have the vaccine?

No, vaccination against COVID-19 is voluntary.

Can employers implement a “no job, no job” policy?

In short, it is not possible for employers to implement a “no job, no job” policy in the Netherlands.

An employer cannot mandate employees to be vaccinated because this may cause an infringement on employees’ physical integrity. The right on physical integrity is a constitutional right (article 11 Dutch Constitution). Employers may only infringe this right if there is (a) a legal basis, (b) legitimate interest and (c) when it is necessary for the purpose of that legitimate interest. For employers, such a legal basis does not exist in the Netherlands when it comes to mandating vaccinations.

We expect that for certain employers in healthcare and/or manufacturing, such a legal basis may be established in the future (moreover because such a legal basis already exists for the Hepatitis-B vaccination for surgery workers).

However, for employers where employees could work in a regular office situation and the employer could take other measures in order to comply with its duty of care (article 3 Dutch Occupational Health Act) we do not expect that there will be a legal basis in the future that allows employers to mandate employees to be vaccinated.

Furthermore there are privacy issues that make a “no job, no job” policy impossible. Due to the GDPR, employers are not allowed to register who is vaccinated and who is not.

Would it make any difference if the employee/applicant said they could not/would not have the vaccine because of their religious beliefs or because they had a condition that amounted to a disability under discrimination legislation?

No, because employers cannot insist on their staff having the vaccine.

Will employers be able to arrange for the vaccination of their own staff? Maybe

The Dutch government will arrange for every citizen to get the vaccination. There is no suggestion at the moment that employers will be able to access one of the approved vaccines for use with their own staff. If sufficient vaccines are available, maybe employers would be able to offer the vaccine to their employees on a voluntary basis, in the same way as some employers currently do for the flu vaccine.

Will employers be obliged to ensure their staff get vaccinated?

No, there is no such obligation.

Would an employee’s refusal to have the vaccine constitute an unreasonable failure to comply with a reasonable management request?

No.

Should employers check employees’ vaccination status before allowing them into the workplace?

There is no legal obligation to do so. This working method creates a risk under the applicable data protection law, as it is not clear at this point whether the Dutch DPA considers such a check (and the subsequent consequences thereof) as processing personal data under the GDPR and/or the Dutch GDPR Implementation Act.

Is there provision for a “vaccination passport” in the Netherlands and, if so, can employers ask employees to show that before allowing them into the workplace? 

Yes, based on the Digital EU-COVID Certificate regulation and the Dutch “*Tijdelijke wet coronatoegangsbewijzen*”, the use of a “vaccination passport” is provided for by law. A Dutch COVID-19 Certificate shows someone’s proof of vaccination, a negative test result or proof of recovery. With this COVID-19 Certificate, people in the Netherlands can travel within the EU or attend events or activities in the Netherlands. There is, however, no legal ground for employers to use the COVID-19 Certificate in an employment context. If an employer wishes to check its employees’ COVID-19 Certificates before allowing them into the workplace, the provided guidance in relation to the processing of personal data is applicable (see below under: “Are there data protection/privacy considerations in relation to this?”).

Can employers refuse entry to the workplace if an employee refuses to have the vaccine? Maybe

This depends on the circumstances. For example, if an employee works in a care institution with people with vulnerable health, this could be an option. If this is the case, the employer should investigate whether there are other suitable tasks the employee can perform. However, at the moment, it is problematic that employers are not allowed to process information about the vaccination status of an employee under the GDPR and Dutch GDPR Implementation Act (see below).

Can a client refuse to allow our staff on its premises/to work alongside its own employees unless our staff have had the vaccine? Maybe

Practically, this will be difficult. As mentioned, employers are not allowed to process information about the vaccination status of an employee. Because an employer does not know which employees have been vaccinated it is not an option for it to agree with the client that only vaccinated individuals will work on the client’s premises or with its employees.

Furthermore, the client may not be able to process the vaccine status of your staff. For the processing of this health data, the staff’s explicit consent is required. Due to the imbalance in power between the client and your staff, this consent is unlikely to be considered freely given. Staff might feel compelled to consent to such processing to meet the employer’s wishes.

Are there data protection/privacy considerations in relation to this? 

Yes, the employer is – in principle – not allowed to process information about the vaccination status of an employee. This is the case even if the employee voluntarily discloses their vaccination status to the employer.

The GDPR only allows the processing of personal data – including information about a person’s health, such as their vaccination status – for an explicit, specified and legitimate purpose. The Dutch Data Protection Authority – the Dutch DPA – maintains that it is not certain whether employers can comply with this rule if they record COVID-19 vaccinations. This has to do with the fact that it is not yet certain, according to the National Institute for Public Health and the Environment, whether vaccinated individuals are still contagious. Therefore, both vaccinated and non-vaccinated individuals have to follow the same rules for the use of personal protective equipment, etc. The Dutch DPA maintains that as long as this is the case, recording the vaccination status of employees serves no explicit, specified and legitimate purpose. This means that there is no reason for employers to record this information.

The GDPR also provides that employers are not allowed to process any data relating to the health of their employees, unless there is a statutory exception. Such an exception may be the explicit consent of the employee, or it may follow from rules of national law, such as the Dutch GDPR Implementation Act. The Dutch DPA believes that employees are usually not “free” to give their consent, since they are in a relationship of dependency. Consent is, therefore, not a legally valid ground for the processing of the vaccination status of employees. Furthermore, there is no specific exception under national law that allows employers to register data about COVID-19 vaccinations of employees.

The GDPR and Dutch GDPR Implementation Act, however, are not applicable if employees’ vaccination status is not processed in an automated manner (e.g. by email or telephone) or registered. So, if the employer, for instance, verbally asks the employee whether or not they have been vaccinated and the employee’s reply will not be registered, there seems to be some leeway under the applicable data protection law to legitimately do so. At this moment, the Dutch DPA has not taken a very clear standpoint yet on whether the employer “processes” health data if it only requires from employees to show or announce their vaccination status (without registering any information). However, as the consequences of showing that an employee is not vaccinated will be registered (e.g. the employee will not be in the office when they planned to do so and they are not on sick leave or on holidays) it will be pretty easy for the organisation (both co-workers and the employer) to know who is vaccinated and who is not.

Netherlands

The rationale behind the ban on processing of health data is that such information is highly sensitive and can easily be misused by the employer or co-workers. Therefore, we expect that it will be confirmed by the Dutch DPA during upcoming months that asking without registering is also not permitted under data protection legislation.

Are there any other issues that employers should consider in relation to this issue?



Not at the moment.

Is there any guidance available for employers?



There is no specific information for employers. However, there is some general information available (in Dutch) on the official government [website](#).

Contact

In the Netherlands we seek assistance from Kennedy Van der Laan, an independent and unconnected law firm.



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Has the rollout of the vaccine commenced?

Vaccinations were initially made available to medical staff only, but they have since been made available to everyone above 12 years of age. All eligible groups have now had the ability to get vaccinated.

Has the Polish government made it mandatory to have the vaccine?

There is currently nothing to suggest that the vaccine will be mandatory for all employees or the general public. So far, the Polish government has consistently declared that vaccination will be voluntary.

Can employers implement a “no jab, no job” policy?

No, as vaccination is not mandatory.

Would it make any difference if the employee/applicant said they could not/would not have the vaccine because of their religious beliefs or because they had a condition that amounted to a disability under discrimination legislation?

No, there is already no right to require employees to have the vaccine irrespective of religious beliefs or any other reason.

Will employers be able to arrange for the vaccination of their own staff?

Since the second half of May 2021, the largest employers have been able to arrange for the vaccination of their own employees, contractors and their families irrespective of their age or the legal basis on which they are employed. Vaccinations may be organised by a single employer, groups of employers (e.g. from one office building or companies from capital groups), professional organisations or universities.

Will employers be obliged to ensure their staff get vaccinated?

No, there is nothing to suggest that such an obligation will be placed on employers.

Would an employee’s refusal to have the vaccine constitute an unreasonable failure to comply with a reasonable management request?

No.

Should employers check employees’ vaccination status before allowing them into the workplace?

No.

Should employers check employees’ vaccination status before allowing them into the workplace?

No.

Is there provision for a “vaccination passport” in Poland and, if so, can employers ask employees to show that before allowing them into the workplace?

In line with other EU member states, the vaccination passport, also called the Green pass or Covid pass, exists and is mostly used for travel purposes. Employers are not entitled to demand such a pass from their employees, just as they cannot prevent them from entering the workplace.

Can employers refuse entry to the workplace if an employee refuses to have the vaccine?

No, as the vaccine is not mandatory.

Can a client refuse to allow our staff on its premises/to work alongside its own employees unless our staff have had the vaccine? Maybe

It is possible that some businesses will want to consider this approach. However, given that (i) vaccination is not mandatory in Poland; and (ii) it is doubtful if the employer would have the right to obtain this information or make it available to third parties, at this point in time, it would not be considered as the prevailing or likely approach. If this did occur, it would be advisable to discuss with the client its concerns, the contractual terms between the parties (how far denial of access may interfere with your ability to provide the goods or services contracted for), whether this presents an issue for any of your staff, whether its concerns could be mitigated by alternative measures, e.g. regular testing of your staff, etc.

As highlighted, there are also data protection issues to consider in terms of being able to collect and share this information with the client, as it concerns identifiable individuals and their health related data. You should also separately ensure you consider your own health and safety/employment law obligations when it comes to deploying your staff to client sites, which may include understanding what precautions the client has taken to protect their and your staff.

Are there data protection/privacy considerations in relation to this? 

Inevitably, yes. Information about who has been vaccinated and when will constitute special category data. The same will be true of information about who has not been vaccinated and why. Any health-related data is considered special category data and the processing of such data is generally forbidden. An employee's consent may constitute grounds for processing special categories of personal data only where the employee provided such data on his/her own initiative. Consequently, Polish law excludes the use of consent where the employee is not the initiator of the communication on the vaccination. Refusal to provide this data shall not constitute the basis for unfavourable treatment of the employee.

Are there any other issues that employers should consider in relation to this issue? 

Employers should be conscious of the fact that while most people welcome the arrival of an effective vaccine, others have genuine concerns about the vaccine, the speed at which it has been developed, potential side effects, etc. and large groups of the Polish population have not been vaccinated yet.

An outline of a draft new bill was published in August 2021 that would allow employers to require and process vaccination data about their employees. Employers would also be able to take certain actions where an employee was not vaccinated (e.g. assign them to work in a different place/role). It is not clear, however, if and when it will be enacted into law.

Is there any guidance available for employers? 

There is guidance on vaccinations at the workplace, which is available [here](#).

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What is the latest position concerning the rollout of the vaccine?

The vaccine is available in each region. For example, in Moscow the vaccine is available to any Russian citizen free of charge, with a few restrictions, i.e. citizens under 18 years old, pregnant women, etc. As of January 18, it is possible to get vaccinated without an appointment. In shopping centres and other public places, there are mobile vaccination points (stations).

Has the Russian government made it mandatory to have the vaccine?

At the moment, the COVID-19 vaccine is not mandatory. In order to be mandatory, it will have to be included in the attachment to Federal Law N 157 regarding immunisation against infectious diseases. As soon as it is included, it will be mandatory for those professions included in the list, which includes medical workers, teachers, etc.

However, in urgent cases (the threat of the emergence and spread of infectious diseases that pose a danger to others), compulsory immunisation can be carried out without amending the law, by order of the Chief Sanitary Doctor (Deputy Sanitary Doctor) of a respective region of Russia. This order can be issued with regard to specific professions and positions.

Currently, almost all regional Chief Sanitary Doctors have issued orders regarding the compulsory vaccination of a certain percentage of employees in specific professions (trade enterprises, educational and medical institutions, etc.).

Citizens who do not comply with the requirements of the above order may refuse vaccinations, but in such circumstances, they should be suspended from work for the relevant period without pay.

Can employers implement a “no jab, no job” policy?

For certain positions

Yes, but only for those professions and specialists included in the list for whom vaccination is now mandatory as a result of orders from the regional Chief Sanitary Directors.

Would it make any difference if the employee/applicant said they could not/would not have the vaccine because of their religious beliefs or because they had a condition that amounted to a disability under discrimination legislation?

No. Only if they have a reason not to have the vaccine for medical reasons.

Will employers be able to arrange for the vaccination of their own staff?

Employers are not obliged to arrange for vaccination. Vaccination is available at the special vaccination points (stations). Although it is not a mandatory requirement, it is highly recommended (by the Russian authorities) that employers provide a paid vacation day for vaccination (in this case, the employee must confirm that he/she used this day for its intended purpose by submission of a certificate of vaccination). In general, the authorities recommend employers take measures to support vaccinated employees.

Will employers be obliged to ensure their staff get vaccinated?

For certain positions

Yes, but only for those professions and specialists included in the list for whom vaccination is now mandatory as a result of orders from the regional Chief Sanitary Directors.

Would an employee’s refusal to have the vaccine constitute an unreasonable failure to comply with a reasonable management request?

For certain positions

Yes, but only for those professions and specialists included in the list for whom vaccination is now mandatory as a result of orders from the regional Chief Sanitary Directors.

Should employers check employees' vaccination status before allowing them into the workplace?



For certain positions

Yes, but only for those professions and specialists included in the list for whom vaccination is now mandatory as a result of orders from the regional Chief Sanitary Directors.

Is there any guidance available for employers?



The Ministry of Labour and Rospotrebnadzor have recently published clarification on the government's approach to mandatory vaccination. This provides guidance for employers on what they need to do if the Chief Sanitary Doctors make decisions on introducing preventative vaccinations.

Is there provision for a "vaccination passport" in Russia and, if so, can employers ask employees to show that before allowing them into the workplace?

Maybe

The COVID-19 Electronic Certificate of Vaccination (which contains a QR-code) is a digital document that certifies that the individual is vaccinated against COVID-19.

Russian citizens need it mainly for traveling abroad (to countries that recognise the Russian certificate), as well as for re-entering Russia. However, it is optional and may be replaced by a negative test certificate or a certificate that the person has had COVID-19.

Employers in industries not specifically specified in the law do not have the right to require proof of such a certificate for admission to the workplace.

Can employers refuse entry to the workplace if an employee refuses to have the vaccine?



For certain positions

Yes, but only for those professions and specialists included in the list for whom vaccination is now mandatory as a result of orders from the regional Chief Sanitary Directors.

Can a client refuse to allow our staff on its premises/to work alongside its own employees unless our staff have had the vaccine?

Maybe

Ultimately, this would be the client's decision and it is possible that some businesses may adopt this approach. In such circumstances, it would be advisable to discuss with the client its concerns, the contractual terms between the parties (how far denial of access may interfere with your ability to provide the goods or services contracted for), whether this presents an issue for any of your staff, whether its concerns could be mitigated by alternative measures, e.g. regular testing of your staff, etc. There are also data protection issues to consider in terms of being able to share this information with the client, as it concerns identifiable individuals. You should separately ensure you consider your own health and safety/employment law obligations when it comes to deploying your staff to client sites, which may include understanding how far the client has required its own staff to be vaccinated and the other precautions it has taken.

At the moment, it is too early to give a definitive answer to this question. There is a lot of discussion about "COVID passports" (a document confirming vaccination) and the legal implications of using such passports, as well as the legality of using such documents in light of human rights and limits on such rights.

Are there data protection/privacy considerations in relation to this?



It appears that employers can process information about vaccination only with regard to those employees who are subject to a mandatory requirement for vaccination in connection with their job.

With regard to employees for whom vaccination is not mandatory, it appears that the employer does not have a right to collect and process this information, unless such employees provide their written consent in this regard.

Vaccination data can only be obtained directly from the employee.

An employee's vaccination data may only be processed and transferred abroad subject to the employee's prior written consent.

Employees are not obliged to inform the employer about their vaccination status, and should not be pressured to confirm if they have been vaccinated but can share this information voluntarily if they choose to. Employees should be notified that if expressly required by local law, absence of vaccination or confirmation of vaccination may lead to suspension.

Are there any other issues that employers should consider in relation to this issue?



No.

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Has the rollout of the vaccine commenced?

See comments below in relation to the implementation of mandatory vaccines in Saudi Arabia. As of September 2021, approximately 59% of the residents and citizens in KSA have been fully vaccinated.

Has the Saudi government made it mandatory to have the vaccine?

As of 1 August 2021, it is mandatory for public and private sector workers to have been vaccinated against COVID-19 in order to attend the workplace. The government has enforced this rule, which is now in effect and attaining COVID-19 vaccinated status is now mandatory for the following:

- Entry for all economic, commercial, cultural, entertainment or sporting activities
- Entry for all cultural, scientific, social or entertainment events
- Entry into all governmental or private establishments (whether to perform business or audit)
- Entry into all governmental or private educational facilities (whether to perform business or audit)
- Use of public transportation

On 9 August 2021, the Ministry of Human Resources and Social Development (MHRSD) announced some guidance via a number of media outlets to employers on how to deal with unvaccinated employees. The guidance advises that employees who remain unvaccinated and who cannot work remotely will be required to exhaust their annual leave and go on unpaid leave. Thereafter, their employment will be suspended pursuant to the provisions of the KSA Labour Law. We understand further guidance on this is expected to be formalised in the coming weeks.

Can employers implement a “no job, no job” policy?

Maybe

While employers will have the ability to require staff to be vaccinated, this only extends to facilitating the physical return of employees to the workplace. This rule should only be relied upon for those individuals who cannot work from home. As confirmed above, the MHRSD has advised that employees who cannot work remotely will be required to exhaust their annual leave and go on unpaid leave and, thereafter, their employment will be suspended pursuant to the provisions of the Labour Law. We understand further guidance is expected to be formalised in the coming weeks.

As no formalised, detailed guidance has yet been published, we recommend employers seek to find a balance, as requiring individuals to return to the workplace remains a grey area. As it is (usually) a contractual requirement of employment for individuals to work from a prescribed place of work/at a location and considering this in tandem with the government’s mandatory requirement, employers currently have a good argument that individuals should be required to attend the workplace and, therefore, undertake vaccination if they have not already.

However, while the legal argument may be weak for any employee to push back on this if they insisted on continuing to work from home in order to avoid vaccination (particularly if they have been and are capable of working from home and if they wish for a remote working arrangement to continue), an employer would need to consider the reputational/ PR aspects of declining any such ongoing remote working requests for individuals who do not wish to undergo vaccination.

Employers will, however, be able to prescribe vaccination as a pre-condition of employment for any new employees with appropriate wording in the corresponding offer letter and employment contract (with the exception of those individuals with medical exemptions for which there is no guidance available).

Would it make any difference if the employee/applicant said they could not/would not have the vaccine because of their religious beliefs or because they had a condition that amounted to a disability under discrimination legislation?

Maybe

With the exception of those individuals who may continue to work remotely, the scope of any exceptions that could be applied remains unclear for those who cannot receive the vaccine for medical reasons.

The MHRSD is expected to clarify the procedures including any applicable exemptions underpinning the newly enforced rule in the near future.

Will employers be able to arrange for the vaccination of their own staff? Maybe

At the moment, it is not clear if or when employers will be able to access one of the approved vaccines for use with their own staff. It may be that at some stage, employers will be able to arrange (and pay) for the vaccination of their own staff, in the same way as many currently do for the flu vaccine.

Will employers be obliged to ensure their staff get vaccinated? 

Yes, to the extent staff are required to physically attend the workplace (i.e. cannot work remotely).

Would an employee's refusal to have the vaccine constitute an unreasonable failure to comply with a reasonable management request? Maybe

In the context of individuals who, by virtue of their job role and functions, are required to be in the workplace, there is a very strong argument that an employee's refusal to undergo vaccination following 1 August would constitute a failure to comply with a reasonable management request and give the employer a right to commence disciplinary proceedings as required.

Article 66 of the KSA Labor Law permits a number of potential disciplinary penalties that can be enforced by the employer, which could include fines, suspension from work and potentially dismissal (in addition to any other penalties set out in a company's internal regulations as lodged with the authorities in KSA).

Should employers check employees' vaccination status before allowing them into the workplace? 

Yes.

Is there provision for a "vaccination passport" in Saudi Arabia and, if so, can employers ask employees to show that before allowing them into the workplace? 

Yes, employers are required to ask employees to evidence their vaccination status via the Tawakkalna mobile application, which is being utilised in the Kingdom in effect as a "vaccination passport".

Can employers refuse entry to the workplace if an employee refuses to have the vaccine? 

Yes.

Can a client refuse to allow our staff on its premises/to work alongside its own employees unless our staff have had the vaccine? 

Yes.

Is there any guidance available for employers 

With the exception of the MHRSD's public announcement on 9 August 2021 offering brief guidance on the rule for mandatory vaccinations, there is no other guidance for employers available.

Are there any other issues that employers should consider in relation to this issue? 

Employers should be alive to the fact that while most people welcome the arrival of an effective vaccine, others have genuine concerns about the vaccine, the speed at which it has been developed, potential side effects, etc. Employers may, therefore, find there is some pushback in connection with this issue, likely from those employees who argue they have a medical or religious exemption from receiving the vaccination but who cannot in the same vein work remotely. As with most things COVID-19-related (compulsory testing, the introduction of other safety measures in the workplace, etc.), employers should ensure they communicate with their staff, explain the rationale for their approach on vaccination, consider any feedback, etc.

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What is the latest position concerning the rollout of the vaccine?

As at 19 September 2021, 82% of the population has been fully vaccinated.

Eligible seniors and those who are immunocompromised are now being encouraged to receive their booster dose of an mRNA vaccine about six to nine months after completing their primary course of the vaccination.

Has the Singapore government made it mandatory to have the vaccine?



No, taking the vaccine is voluntary.

Can employers implement a “no jab, no job” policy?



No, as employers have no right to require employees to have the vaccine, However, employers may implement vaccination-differentiated workplace measures (e.g. require unvaccinated employees to undergo regular testing or redeploy unvaccinated employees to roles with a lower risk of COVID-19 infection).

Would it make any difference if the employee/applicant said they could not/would not have the vaccine because of their religious beliefs or because they had a condition that amounted to a disability under discrimination legislation?



No, as employers have no right to require employees to have the vaccine.

Will employers be able to arrange for the vaccination of their own staff?

Maybe

The Singapore government has made the vaccine available to all Singapore residents free of charge.

Will employers be obliged to ensure their staff get vaccinated?



Not as things stand.

Would an employee’s refusal to have the vaccine constitute an unreasonable failure to comply with a reasonable management request?



Not as things stand.

Should employers check employees’ vaccination status before allowing them into the workplace?

Maybe

Employers may ask employees about their vaccination status for business purposes, e.g. business continuity planning, or to implement vaccination-differentiated workplace measures (such as requiring unvaccinated employees to undergo regular testing).

Is there provision for a “vaccination passport” in Singapore and, if so, can employers ask employees to show that before allowing them into the workplace?

Maybe

An individual’s vaccination status is set out in the “TraceTogether” app, a contact-tracing app that individuals are required to download and use when entering various premises in Singapore (e.g. shopping malls, businesses, etc.). Employers can refer to the vaccination status set out in the app when seeking information on employees’ vaccination status for the purposes referred to above.

Can employers refuse entry to the workplace if an employee refuses to have the vaccine?



This is unlikely, as it appears that the government directive is that Singapore residents can choose to take a vaccine jab on a voluntary basis. With the directive in place, it is unlikely that an employer will be able to refuse entry to an employee who does not wish to take the vaccine.

Singapore



Can a client refuse to allow our staff on its premises/to work alongside its own employees unless our staff have had the vaccine? ❌

This is unlikely, as the Singapore government has stated that the vaccine is voluntary. It is, therefore, unlikely that any business would impose such a restriction.

Are there data protection/privacy considerations in relation to this? ✅

Yes, information about who has (and has not) been vaccinated and when/why not will constitute personal data that is protected under the Personal Data Protection Act 2021. While there is an exception to the requirement for consent to collect personal data for the purpose of managing or terminating an employment relationship, we are of the view that employers will require employees' specific consent to collect vaccination personal data, as there is currently no mandatory vaccination requirement imposed by law.

Are there any other issues that employers should consider in relation to this issue? ✅

Employers should be alive to the fact that while most people welcome these developments, others have genuine concerns about the vaccine options, the speed at which the different vaccines have been developed, potential side effects, etc. Employers may, therefore, find there is some pushback in connection with this issue. Furthermore, some employees may have medical reasons for not being vaccinated.

As with most things COVID-19-related (compulsory testing, the introduction of other safety measures in the workplace, etc.), employers should ensure they communicate with their staff, explain the rationale for their approach on vaccination, consider any feedback, etc.

Is there any guidance available for employers? ✅

The tripartite partners issued an advisory to provide guidance to both employers and employees on COVID-19 vaccination policies at the workplace. The advisory (which is updated from time to time), can be found [here](#).

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What is the latest position concerning the rollout of the vaccine?

The vaccine rollout has commenced and approximately 40% of the adult population has been fully vaccinated.

Has the Slovak government made it mandatory to have the vaccine?

The government has not made vaccination mandatory, although the Minister of Health of the Slovak Republic wants to open up the topic of compulsory vaccination for groups such as the police, soldiers, paramedics and teachers.

Can employers implement a “no jab, no job” policy?

No, vaccination is currently voluntary so employees cannot be discriminated against if they choose not to be vaccinated.

Would it make any difference if the employee said they could not/ would not have the vaccine because of their religious beliefs or because they had a condition that amounted to a disability under discrimination legislation? Maybe

In the event that vaccination becomes compulsory for certain groups, the scope for people who, for certain reasons, cannot be vaccinated would also have to be dealt with.

Will employers be able to arrange for the vaccination of their own staff? Maybe

Vaccination is currently being carried out by the state.

It may be that at some stage, employers will be able to arrange (and pay) for the vaccination of their own staff, for example, in the same way as many currently do for the flu vaccine. However, an employer that offers vaccinations onsite also takes on all the attendant medical, privacy and insurance risks and responsibilities. Given the widespread availability of the vaccine through state channels, it is hard to make a clear case for doing so.

Will employers be obliged to ensure their staff get vaccinated? Maybe

Currently employers are not required to provide vaccinations for their employees. Vaccination is organised by the state and is voluntary. However, it is possible that in the future, if vaccination becomes mandatory for certain groups of people (police officers, soldiers, paramedics, teachers), such an obligation could arise for employers.

Would an employee’s refusal to have the vaccine constitute an unreasonable failure to comply with a reasonable management request? Maybe

Without a legal prescription of mandatory vaccination, employers cannot force employees to get vaccinated. For example, employees who as part of their job description are, or may be, exposed to dangerous illnesses are under an obligation to undergo vaccination for certain types of illness. Employers in such circumstances are under an obligation to pay for such vaccinations. If an employee refuses to get vaccinated in such circumstances, this would constitute a failure to comply with a reasonable management request.

The question of what is a reasonable refusal will have to be assessed having regard to the particular circumstances of the employee. Employers should not, therefore, adopt a blanket approach when dealing with employees who refuse to take the vaccine. Relevant circumstances will need to be real and substantial to make refusal reasonable.

Should employers check employees’ vaccination status before allowing them into the workplace?

Employers are not entitled to request information about nor confirmation of vaccination status from their employees.

Is there provision for a “vaccination passport” in the Slovak Republic and, if so, can employers ask employees to show that before allowing them into the workplace?

The vaccination passport, also called the Green pass or COVID-19 pass, exists and is mostly used for travel purposes. Employers are not entitled to demand such a pass from their employees, just as they cannot prevent them from entering the workplace.

Can employers refuse entry to the workplace if an employee refuses to have the vaccine? 

Employers cannot prohibit entry to the workplace of unvaccinated persons; the employer is not even entitled to request information on whether the employee is vaccinated. If vaccination becomes mandatory for certain groups of people, this policy may change.

Can a client refuse to allow our staff on its premises/to work alongside its own employees unless our staff have had the vaccine? 

No, under the current policy, people cannot be discriminated against in the performance of their work because they are not vaccinated.

Are there data protection/privacy considerations in relation to this? 

Yes, information about who was vaccinated and when constitutes special category data, as it constitutes health data.

The GDPR sets out a general ban on the processing of such data, but it also contains a number of exceptions where it can be processed.

In order for the processing of employee health data to be considered lawful, the employer must define the purpose of the processing, choose the appropriate legal basis for the processing and fulfil one of the exceptions for the processing of special categories of personal data.

The current situation regarding COVID-19 does not, in any way, limit the ability of individuals to exercise their rights under the GDPR. Employers, as GDPR controllers, should, therefore, also be prepared to request information from employees regarding the processing of personal data for purposes related to the fight against the spread of COVID-19.

Are there any other issues that employers should consider in relation to this issue? 

Employers should be aware of the fact that while most people are pleased and willing to be vaccinated, others have genuine concerns about the vaccine, the speed at which it has been developed, potential side effects, etc. Employers may, therefore, find there is some pushback in connection with this issue. As with most things COVID-19-related (compulsory testing, the introduction of other safety measures in the workplace, etc.), employers should ensure they communicate with their staff, explain the rationale for their approach on vaccination, consider any feedback, etc.

Is there any guidance available for employers? 

Information for employers is available on the website of the National Labor Inspectorate.

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What is the latest position concerning the rollout of the vaccine?

70% of the Spanish population has been vaccinated.

Has the Spanish government made it mandatory to have the vaccine?

According to the vaccination strategy plan, having the vaccine is not compulsory in Spain. The vaccine is administered for free and voluntarily through the National Health System, just like the other vaccines in the calendar.

However, if we reach a situation where the pandemic is out of control, the government has mechanisms in place to require compulsory vaccination.

Can employers implement a “no jab, no job” policy?

The Health Authority has designed the vaccination strategy plan on a voluntary basis. Therefore, it is not possible for employers to implement a “no jab, no job” policy.

Employers cannot force employees to be vaccinated. Consequently, employees cannot be penalised if they do not do so.

Taking that into account, if the reason for dismissal or non- recruitment is the non- vaccination of the employee, the decision could be considered discriminatory.

Would it make any difference if the employee said they could not/ would not have the vaccine because of their religious beliefs or because they had a condition that amounted to a disability under discrimination legislation? Maybe

As vaccination in Spain is voluntary, there will be very few situations where we are going to encounter this type of conflict.

Will employers be able to arrange for the vaccination of their own staff?

No, employers do not have private access to the vaccines. Vaccination is carried out through the National Health System.

The Health Authority has designed the vaccination strategy plan establishing priority order of groups to be vaccinated.

During this time, the Health Authority has been calling citizens to be vaccinated taking into account this priority order. Now that 70% of the Spanish population has been vaccinated, the authorities have set up vaccination points where it is possible to be vaccinated without an appointment.

Will employers be obliged to ensure their staff get vaccinated?

Based on the vaccination strategy plan, no. The government is responsible for ensuring the vaccination of the population.

Would an employee’s refusal to have the vaccine constitute an unreasonable failure to comply with a reasonable management request? Maybe

As explained before, vaccination in Spain is voluntary and it is not possible to impose it. Therefore, if the reason for dismissal of an employee is not being vaccinated, the dismissal would be considered unfair or even null and void in the event that it is considered that such a dismissal involves discrimination against the unvaccinated employee.

Should employers check employees’ vaccination status before allowing them into the workplace?

Vaccination information is personal data relating to health, which in article 9 of the GDPR is classified as special category data, so that the processing of this type of data requires the availability of one of the exceptions provided for in article 9.2 of the GDPR, which allows the prohibition on processing to be lifted. In this situation, no exception justifies the processing of vaccination data.

Requesting information on the immunity status against COVID-19 would go beyond the specific obligations and rights imposed on the company by labour and social security legislation.

Is there provision for a “vaccination passport” in Spain and, if so, can employers ask employees to show that before allowing them into the workplace? 

Once vaccinated, the Health Authority issues a vaccination certificate that citizens can obtain through electronic means.

Likewise, the EU has issued the EU Digital COVID-19 Certificate. It has a QR code that contains essential information, as well as a digital signature to make sure the certificate is authentic. The EU Digital COVID-19 Certificate will be accepted in all EU member states. It will help to ensure that restrictions currently in place can be lifted in a coordinated manner.

Some Spanish regions have stated that before entering bars or restaurants, citizens must show the vaccination certificate. This measure has been very controversial since some courts consider that this measure is against data protection regulations. Requiring proof of the vaccination certificate to access establishments such as bars, restaurants or clothing stores could violate the right to data protection of citizens. The Spanish Data Protection Agency (AEPD) is carrying out an investigation to determine the legality or otherwise of this new rule that seems to be on the rise in some regions. However, there is some concern because health is information with the highest level of protection.

Likewise, employers are not allowed to request that employees show their vaccination certificate before allowing them into the workplace.

Can employers refuse entry to the workplace if an employee refuses to have the vaccine? Maybe

Under normal circumstances, no (vaccination is voluntary).

Nevertheless, if the court (or new regulations) has ordered compulsory vaccination, the employer could be entitled to refuse the employee entry to the workplace.

Can a client refuse to allow our staff on its premises/to work alongside its own employees unless our staff have had the vaccine? Maybe

Vaccination is voluntary, so under normal circumstances a client cannot refuse to allow your staff on its premises/to work alongside its staff. Moreover, you must be concerned about data protection issues, since vaccination data constitutes special category personal data and you may not be allowed to share this information with a client. Nevertheless, it is necessary to comply with your own health and safety/employment law obligations.

Are there data protection/privacy considerations in relation to this? 

Absolutely. The processing of this type of data must comply with the provisions of the GDPR and national implementing laws. It is necessary to keep in mind that vaccination data constitutes special category personal data.

Are there any other issues that employers should consider in relation to this issue? 

The government expects to achieve high levels of vaccination coverage without having to impose compulsory vaccination, since in many cases, mandatory vaccination could have counterproductive effects.

Although vaccination is voluntary in Spain, in general, vaccines have always been very popular and the uptake for this particular vaccine remains high.

Is there any guidance available for employers? 

There is no specific guidance for employers, but the Health Minister has launched the following [webpage](#) explaining the vaccination strategy plan including some FAQs. Likewise, we understand that the Spanish Data Protection Agency will issue guidance regarding data protection.

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What is the latest position concerning the rollout of the vaccine?

The vaccine rollout has commenced and approximately 81% of the residents and citizens in the UAE have been fully vaccinated as of September 2021.

Has the UAE government made it mandatory to have the vaccine?

There is currently nothing to suggest that the vaccine will be mandatory. However, the UAE government is continuing to implement measures, including increased mandatory testing requirements for residents and citizens who have not been vaccinated.

Employers do not have a statutory right to require employees to have the vaccine. If this becomes a mandatory legal requirement from the UAE government, this position may change. In the absence of any such mandatory requirement, any dismissal by an employer of an employee who refuses to have the vaccine would amount to an arbitrary dismissal attracting up to three months' full pay as compensation. Any government guidance for employers on this issue is also likely to be relevant and should help inform an employer's approach.

While employers cannot mandate vaccinations as a requirement to physically return to the workplace, a weekly testing programme could, as an alternative, be implemented, however, the costs of such testing would need to be borne by the employer. If an employer adopts this approach, it should ensure that when implementing any testing programme, it publishes the application of this programme/rule in a prominent place within the workplace and makes it clear within this that this is a company-instruction related to the health and safety of employees in the workplace (pursuant to the company's general obligation under the Federal Law No. (27) of 1981 Concerning Communicable Disease Prevention to put in place internal processes which prevent the spread of COVID-19) – this will mitigate any risk should an employee refuse to undergo weekly testing.

Can employers implement a “no job, no job” policy? Maybe

Employers would need to seek the consent of existing employees, as any proposal that vaccination is mandatory to be able to return to the workplace would be deemed to be a change to the employee's terms and conditions, which would require their prior consent. For new hires, we would recommend seeking consent/requiring vaccination at the outset/commencement of the employment relationship for which there is no legal risk.

Would it make any difference if the employee said they could not/would not have the vaccine because of their religious beliefs or because they had a condition that amounted to a disability under discrimination legislation?

No, as there is already no right to require employees to have the vaccine irrespective of religious beliefs or any other reason.

Will employers be able to arrange for the vaccination of their own staff? Maybe

At the moment, it is not clear if or when employers will be able to access one of the approved vaccines for use with their own staff. Vaccinations are, however, increasingly being administered for those in frontline and federal government positions in the UAE.

It may be that at some stage, employers will be able to arrange (and pay) for the vaccination of their own staff, for example, in the same way as many currently do for the flu vaccine.

Will employers be obliged to ensure their staff get vaccinated?

No, as things currently stand there is no such obligation placed on employers.

Would an employee's refusal to have the vaccine constitute an unreasonable failure to comply with a reasonable management request?

No.

Should employers check employees' vaccination status before allowing them into the workplace?

From a UAE labor law perspective, there are no specific legal restrictions in place that would prevent employers from asking employees to disclose their vaccination status on a voluntary basis. Employers cannot, however, make it mandatory for employees to disclose their vaccination status. Individuals have a right to privacy and there are no laws in the UAE that permit an employer to impose a vaccination requirement as a condition of employment for existing employees without consent. Most importantly, employers are not permitted to take any action/penalise those employees who have not been vaccinated or refuse to disclose their vaccination status, as this could lead to risks of a claim for damages and arbitrary and/or constructive dismissal (the latter of which carries a risk of compensation for up to three months' gross salary).

For employers based in the DIFC and ADGM, information about who has been vaccinated will constitute special category data under the DIFC DPL and ADGM DPR. Employers will, therefore, need to consider whether checking their respective employees' vaccination status will constitute large-scale gathering and processing of "special categories" of personal health data. Employers in the DIFC and ADGM will, therefore, need to account for any necessary compliance steps before any gathering or processing commences.

Is there provision for a "vaccination passport" in the UAE and, if so, can employers ask employees to show that before allowing them into the workplace?

Vaccination status must be evidenced (as and where required) via the AI Hoshn application or an electronic certificate (to the extent accepted by the relevant premises/entity). Across the UAE, only people who have received both doses of the COVID-19 vaccine are permitted to enter bars, nightclubs, music concerts and live events.

In Abu Dhabi only, from 15 June 2021, a "green pass" COVID-19 safety protocol is now in effect. Residents and tourists need to show the green pass on the AI Hoshn application to gain entry to public parks, beaches, malls, hotels, large supermarkets, gyms, swimming pools, entertainment centres, restaurants and cafes. The pass on the application is activated after a resident or tourist gets a negative COVID-19 PCR test result; however, its validity will depend on the individual's vaccination status.

In Dubai, bars, nightclubs, live music and sporting events are required to ask all patrons for proof of COVID-19 vaccination via the AI Hoshn app. There is no indication at this current point in time that the green pass COVID-19 safety protocol will be rolled out more widely in Dubai. However, given the general public policy within the UAE and the strong push from the authorities to increase vaccination rates across the Emirates, our view is that the green pass protocol (and corresponding implementation of the AI Hoshn application) is likely to become a requirement in Dubai in the near future.

Can employers refuse entry to the workplace if an employee refuses to have the vaccine?

Maybe

Possibly, yes, although each case should be considered on its own facts and employers should consider whether it is really necessary to refuse an employee access to the workplace, particularly if employees have been back in the workplace before the vaccine is available.

Can a client refuse to allow our staff on its premises/to work alongside its own employees unless our staff have had the vaccine?

Maybe

Ultimately, this would be the client's decision and it is possible that some businesses may adopt this approach. In such circumstances, it would be advisable to discuss with the client its concerns, the contractual terms between the parties (how far denial of access may interfere with your ability to provide the goods or services contracted for), whether this presents an issue for any of your staff, whether its concerns could be mitigated by alternative measures, e.g. regular testing of your staff, etc. There are also data protection issues to consider, particularly if you are based in the ADGM or DIFC where this is more strictly regulated, in terms of being able to share this information with the client, as it concerns identifiable individuals.

Are there data protection/privacy considerations in relation to this?



With the exception of specific regulations around data protection/privacy within the Dubai International Financial Centre (DIFC) and Abu Dhabi Global Market (ADGM) (see below), the UAE does not have any specific federal laws of general application on data privacy or protection.

For the purpose of any data processing as a result of a vaccination for an individual, the UAE Constitution of 1971 is arguably the most material, although the degree to which it could apply is relatively limited. The UAE Constitution guarantees the right to secrecy of communications, but only those of UAE nationals. In addition, difficulty arises in determining what information would be considered to be a “secret”. There is no judicial guidance on the meaning of the term “secret” in this context, and it is arguable whether or not the use of data flowing from the vaccinations of individual employees would fall within the scope of this term.

Obtaining the consent of the data subject (employee) negates any risk in this context, so if it is possible to obtain consent, that would be the safest approach. In the absence of such consent, it is not possible to say that there is no risk that such use/disclosure of personal information will breach the relevant prohibitions in the Federal Law No. 9 of 1987 (i.e. the UAE Penal Code).

Data protection/privacy is considerably more regulated in the DIFC and ADGM by virtue of the recently enforced Data Protection Law DIFC Law No. 5 of 2020 (DIFC DP Law) and ADGM Data Protection Regulations 2021 (ADGM DPR).

Information about who has been vaccinated and when will constitute special category data; however, the same will be true of information about who has not been vaccinated and why. That data will need to be kept subject to all the appropriate protections against loss or unnecessary disclosure, etc. Records will need to be kept long enough to be used in any possible proceedings arising out of the vaccination, e.g. if it comes to action against the employee.

These will constitute valid grounds for processing under the legal obligation, especially if the employee is provided with a prior written notice as to the employer’s intentions in this respect. Employers must be fully transparent about how this particular personal data will be used and who will have access to it, which may require them to amend or supplement their current employee privacy notice.

Where employers process health information, they are required under the DIFC DP Law to carry out a data protection impact assessment to document whether the use of this data is necessary and proportionate and whether it complies with the applicable laws.

Are there any other issues that employers should consider in relation to this issue?



Employers should be alive to the fact that while most people welcome the development of an effective vaccine, others have genuine concerns about the vaccine, the speed at which it has been developed, potential side effects, etc. Employers may, therefore, find there is some pushback in connection with this issue. As with most things COVID-19-related (compulsory testing, the introduction of other safety measures in the workplace, etc.), employers should ensure they communicate with their staff, explain the rationale for their approach on vaccination, consider any feedback, etc.

Please note, that while vaccination is not a mandatory requirement generally from the UAE government, it is becoming increasingly difficult for individuals to do many things such as attend live events or concerts if they are not vaccinated.

Is there any guidance available for employers?



Unfortunately, there is not currently any guidance for employers available. Employers would be well advised to keep a close eye on UAE and local government/municipality communications through the local news and media briefings from the government.

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What is the latest position concerning the rollout of the vaccine?

At the time of preparation, nearly 90% of UK adults have had their first jab and over 75% are fully vaccinated. It is anticipated that by the end of September, all adults in the UK will have had the opportunity to be vaccinated if they wish.

Has the UK government made it mandatory to have the vaccine?



The government has not made the vaccination mandatory, although from November, vaccination will be compulsory in England for those working or volunteering in registered care homes, unless medically exempt. It is not impossible to foresee similar moves in other industries in the future if the virus remains prevalent or new variants of concern emerge. Indeed, a consultation is currently taking place on making it mandatory for frontline health and care staff in England to be vaccinated against COVID-19 and the flu.

Can employers implement a “no jab, no job” policy?

Maybe

This is a question that has gained much traction in the British press, with some well-known companies making it clear that they do intend to make vaccination a condition of continued employment. However, is there a legal basis for doing this, and would any such dismissal or refusal to hire be lawful?

Potentially yes to both, although this issue is evolving and we are yet to have any case law on this matter by way of precedent. Each case would need to be considered on its particular facts. Employers should avoid adopting a blanket approach on this issue and we would recommend seeking legal advice before dismissing/refusing to hire an individual based on their vaccination status.

Whether an employer’s decision to dismiss is reasonable is likely to depend on a number of factors, including:

- (i) Whether the employee’s refusal to have the vaccine poses a serious health risk to others (e.g. colleagues, customers, clients, etc.) and this risk could not be mitigated sufficiently in other ways (e.g. remote working, face masks, complying with government guidelines on mitigating the spread of COVID-19, etc.)
- (ii) Any requirements imposed by third-party stakeholders, such as clients and service suppliers (see below)
- (iii) The sector in which the employee works, the physical environment in which they work, their proximity to others (especially vulnerable others) and the nature of their job
- (iv) The employee’s reasons for refusing to have the vaccine and whether these are real and substantial, etc. (though having said that, if an employer is primarily focused on the risk posed to the rest of its workforce by unvaccinated employees, their reasons for not having it, disability/pregnancy aside – see below – are much less relevant than if the health and safety of others was not potentially compromised by that refusal

In terms of new hires, on the basis that they would not have the right to claim unfair dismissal, it should be more straightforward to refuse to hire on the basis of vaccination status, but please note, the answer to the question below, as the Equality Act 2010 protects applicants as well as employees.

Would it make any difference if the employee/applicant said they could not/would not have the vaccine because of their religious beliefs or because they had a condition that amounted to a disability under the Equality Act 2010? Maybe

An employer would certainly need to take these factors into account and be prepared to justify its decision if a discrimination claim were brought. As set out above, however, in light of the significantly greater threat to the public posed by an unvaccinated employee, the employee’s individual reasons for not having the vaccine are likely to carry less weight than might normally be the case.

Is being an anti-vaxxer a philosophical belief allowing employees to argue they fall under the Equality Act 2010 and should be excluded on that basis? There are a number of conditions to a belief falling under the Equality Act protections, including that it is something worthy of respect in a democratic society and that there is a coherent belief system behind it. Most reputable scientific opinions would suggest this is not the case for the anti-vax movement (the World Health Organisation has described it as one of the top 10 health threats to the world). The wide range of reasons why people are anti-vax (distrust of Big Science or Big Pharma, bad childhood reaction, historic drug scandals, religion, etc.) suggest that statutory protection under the Equality Act 2010 is unlikely for anti-vaxxers.

By contrast, the Equality Act will apply to protect against detriment or dismissal anyone who is unable to take the vaccine by reason of its likely adverse consequences for them due to an existing medical complaint amounting to a disability, e.g. being immuno-compromised or a sufferer from trypanophobia (clinical fear of needles). The same argument may probably be made in respect of pregnant women where the consequences of the vaccine for the unborn child are not yet seen as fully trialled. In both such cases, the employer should be seen to be willing to make exceptions to general no-job, no-job rules.

Will employers be able to arrange for the vaccination of their own staff? Maybe

There is no suggestion at the moment that employers will be able to access one of the approved vaccines for use with their own staff.

It may be that at some stage, employers will be able to arrange (and pay) for the vaccination of their own staff, for example, in the same way as many currently do for the flu vaccine. However, an employer that offers vaccinations onsite also takes on all the attendant medical, privacy and insurance risks and responsibilities. Given the widespread availability of the vaccine through state channels, it is hard to make a clear case for doing so.

Will employers be obliged to ensure their staff get vaccinated? Maybe

Save for anyone working or volunteering in registered care homes in England, who will be required to be fully vaccinated from November unless medically exempt, employers are not required expressly by statute to ensure their staff are vaccinated.

Would a failure to ensure your staff are vaccinated nonetheless constitute a breach of your obligations under the Health & Safety at Work Act 1974? Section 2 of the Act requires employers to take all reasonably practicable steps to reduce workplace risks to their lowest practicable level. This is unlikely to extend to requiring all employers to provide the vaccine to their staff/ensure their staff get vaccinated. As a minimum, however, employers are obliged to encourage their employees in the most robust of terms to have the vaccine and potentially (see below) to take action against those who refuse.

Would an employee’s refusal to have the vaccine constitute an unreasonable failure to comply with a reasonable management request? Maybe

A requirement to be vaccinated is likely to constitute a reasonable management request where there are good reasons for it, in particular that it will clearly reduce (it does not need to remove) the risk of infection of others. If the same outcome can be achieved through other precautions, or the workplace is such that the preventative effect is very limited, e.g. because the employees work outside or at a distance from one another, then the rationale for imposing the requirement becomes shakier and a refusal, therefore, easier to justify. By contrast, if the management request arises from requirements imposed on the employer by relevant third parties (clients the individual must visit or airlines where the job involves overseas travel), it becomes easier for the employer to insist upon.

The question of what is a reasonable refusal will have to be assessed having regard to the particular circumstances of the employee. Employers should not, therefore, adopt a blanket approach when dealing with employees who refuse to take the vaccine. Relevant circumstances will need to be real and substantial to make refusal reasonable. See comments above regarding factors to take into account when deciding whether a decision to dismiss is reasonable.

Should employers check employees' vaccination status before allowing them into the workplace?

Maybe

There is currently no statutory obligation on employers to do this – although (as above) this will change for anyone working or volunteering in registered care homes in England in November when new regulations come into force requiring them to be fully vaccinated unless medically exempt.

It is accepted medical wisdom that being vaccinated reduces the risk of your passing the COVID-19 virus to anyone else, and, therefore, there are good arguments that knowing whether someone is vaccinated is a necessary precursor to assessing the health and safety risks in your workplace and hence the level of precautions you should be taking. However, even merely asking for information about an employee's vaccination status raises a number of employment, health and safety and data protection issues for employers to consider and so should not be done lightly.

However, the biggest practical problem here is how employers deal with the enforcement of any difference in treatment imposed as a result of the knowledge acquired (one example might be asking those who are not vaccinated to continue wearing face masks). Therefore, it may be best to work backwards from the intended response to knowing that status. In the facemask example, in order to be able to enforce the rule, managers would need to know who is vaccinated and who is not, plus any exemptions – which could lead to data privacy issues. The facemasks could be the visible trigger for trouble between those who are vaccinated and those who are not. Accordingly, if the reality is that the measures you intend to take based on that information will not work or will be more trouble than it is worth, there must be a serious question mark over whether the question is worth asking in the first place. Bizarrely it will probably be easier in practice to enforce a ban on the unvaccinated entering the workplace altogether than to allow them in but then treat them differently.

Is there provision for a “vaccination passport” in the UK and, if so, can employers ask employees to show that before allowing them into the workplace?

Maybe

An NHS COVID Pass shows someone's COVID-19 vaccination details or test results. It allows people in England to demonstrate that they are at a lower risk of carrying COVID-19 at that point in time, whether through vaccination, testing or natural immunity, and so also of transmitting it to others. The pass can be accessed in various ways, but most people are likely to obtain it via the NHS App on their mobile phone.

At this stage, the pass has been introduced to allow people in England to demonstrate their COVID-19 status when travelling abroad or attending certain events and venues in England. It is a snapshot at a particular moment and so is not, therefore, geared for long-term use by employers or in an employment context – although this may of course change.

As the pass has been introduced at this stage for non-employment related reasons, there is no guidance available for using it in an employment context. Having said that, there is nothing expressly stating that employers cannot ask for this information from their employees, and sight of the pass, if offered, can be relied upon by the employer as evidence of vaccination status at that point in time.

Can employers refuse entry to the workplace if an employee refuses to have the vaccine?



Realistically, yes. For the reasons outlined above, employers should consider each case on its particular facts and not adopt a blanket approach, as this could give rise to discrimination claims from certain categories of employees referred to above. Is it really necessary to refuse an employee access to the premises? Potentially, yes, but employers should be seen to consider alternatives first, e.g. continued remote working, face masks, very regular testing, compliance with other guidelines on social distancing, unpaid leave, etc.

Can a client refuse to allow our staff on its premises/to work alongside its own employees unless our staff have had the vaccine? Maybe

Ultimately, this would be the client's decision and it is more than possible that some businesses may adopt this approach. In such circumstances, it would be advisable to discuss with the client its concerns, the contractual terms between the parties (how far denial of access may interfere with your ability to provide the goods or services contracted for), whether this presents an issue for any of your staff, whether its concerns could be mitigated by alternative measures, e.g. regular testing of your staff, etc. There may also be data protection issues to consider in terms of being able to share this information with the client, to the extent that it concerns identifiable individuals.

You should separately ensure you consider your own health and safety/employment law obligations when it comes to deploying your staff to client sites, which may include understanding how far the client has required its own staff to be vaccinated and the other precautions it has taken. If your employee reasonably fears that a client site poses a serious health and safety risk to him/her by reason of any lack of precautions being taken there, they can refuse to go to that site and may be protected from retaliatory sanction or enforcement measures by you.

Are there data protection/privacy considerations in relation to this?

Inevitably, yes. Information about who has been vaccinated and when will constitute sensitive personal health data. The same will be true (even more so) of information about who has not been vaccinated and why. Employers will, therefore, have to comply with their UK GDPR/Data Protection Act 2018 obligations if they obtain and process such information.

Per the ICO's updated guidance, the key question to consider is what are you seeking to achieve and how will data about vaccination status help you achieve this? What are you going to do with that knowledge? Will it dictate who is allowed into the office or to work in certain roles or undertake certain tasks? How will you treat people differently if they are not vaccinated? On the assumption that the underlying purpose is the protection of the health and safety not just of your own workers but also visitors and the public generally, is that something you actually need that information for? Could you procure broadly the same level of protection without that information?

That data will need to be kept subject to all the appropriate principles of data minimisation and protections against loss or unnecessary disclosure, etc. Records will need to be kept long enough to be used in any possible proceedings arising out of the vaccination, e.g. if it comes to action by or against the employee, or by the HSE. These will usually constitute valid grounds for processing under the legal obligation and/or legitimate business interest reasons, especially if the employee is provided with a prior written notice as to the employer's intentions in this respect. Employers must be fully transparent about how this particular personal data will be used and who will have access to it, which may require them to amend or supplement their current employee privacy notice. The information will need to be deleted as soon as it is no longer needed for the purpose for which it was originally acquired, and ideally a periodic review should be carried out by the employer to ensure that that happens.

Where employers process health information, they are required under data protection laws to carry out a data protection impact assessment to document whether the use of this data is necessary and proportionate and complies with data protection laws.

Are there any other issues that employers should consider in relation to this issue?

Employers should be alive to the fact that while most people have welcomed the arrival of effective vaccines, some have genuine concerns about the vaccines, the speed at which they have been developed, potential side effects, etc. Employers may, therefore, receive pushback in seeking to get their staff vaccinated. As with most things COVID-19-related (compulsory testing, introducing other safety measures, etc.), employers should ensure they communicate with their staff, explain the rationale for any decision on vaccination, and consider any feedback, before acting. Any proposed policies in relation to no-job, no-job or lesser measures should ideally be discussed first with recognised unions or other staff representative bodies.

Is there any guidance available for employers?



Acas has produced the following short [guidance](#) for employers.

The Information Commissioner's Office has also produced the following [guidance](#).

And from us, this: remember that whatever steps you take in this regard may be examined later before the Court of Public Opinion with the benefit of hindsight, which you did not have. In view of the demonstrated virulence and lethality of the COVID-19 virus, we consider that there will be little latitude given to employers that go too far to accommodate the issues of individuals where that creates any increased risk at all to the health and safety of the majority. The restrictions and precautions that have been and continue to be taken in relation to COVID are irksome, inconvenient, in some cases distressing and periodically outright harmful, but none of that will be a defence in that Court or any other if you decide not to take protective measures you reasonably could have done and someone, whether or not your employee, falls ill or dies as a result.

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Has the rollout of the vaccine commenced?

Roughly half of the US population has been vaccinated. Vaccination levels differ from state to state.

Has the US government made it mandatory to have the vaccine?



The US government has not made the vaccine mandatory, but it has recently introduced provisions that will require larger employers to ensure their workforce is vaccinated, or in the alternative that they submit to weekly COVID-19 tests.

On 9 September 2021, President Biden announced a six-pronged, comprehensive COVID-19 Action Plan (the Plan), which, in part, will require all employers with more than 100 employees to ensure their workers are vaccinated or tested weekly to comply with a forthcoming Emergency Temporary Standard (ETS) to be issued by the US Occupational Health & Safety Administration. Further details of the Plan can be found in our recent blog [here](#).

Can employers implement a “no jab, no job” policy?

Maybe

Although there has been activity in some state legislatures towards prohibiting private employers from requiring that employees be vaccinated to continue employment (or that applicants be vaccinated as a condition of hire), at present, it remains lawful for a private sector employer in the US to require employees and applicants to be vaccinated as a condition of employment, subject to the duty to reasonably accommodate employees and applicants who are unable or unwilling to receive the vaccine due to medical/disability or religious considerations.

The only exception to this rule is in Montana, which as of May 2021, [prohibits](#) employers from discriminating against employees on the basis of vaccination status.

Would it make any difference if the employee/applicant said they could not/would not have the vaccine because of their religious beliefs or because they had a condition that amounted to a disability under the Equality Act 2010?

Maybe

As set out above, employers that require employees be vaccinated for COVID-19 have a duty to reasonably accommodate employees and applicants who are unable or unwilling to receive the vaccine due to medical/disability or religious considerations.

Will employers be able to arrange for the vaccination of their own staff?

Maybe

Many employers provide on-site clinics or other opportunities for employees to receive seasonal influenza and pneumonia vaccinations in the workplace. If the opportunity presents, employers may be able to provide similar opportunities to employees to receive a COVID-19 vaccination at the workplace.

Additional provisions to facilitate employer arrangements for vaccine administration may be part of the to-be-issued ETS.

Vaccines are widely available from private medical providers and even retail pharmacies.

Will employers be obliged to ensure their staff get vaccinated?

Maybe

As set out above, under the Plan, all employers with more than 100 employees must ensure their workers are vaccinated or tested weekly. Further details of the requirements anticipated under the ETS, and the questions yet to be answered by the ETS, can be found in our blog [here](#).

Would an employee’s refusal to have the vaccine constitute an unreasonable failure to comply with a reasonable management request?

Maybe

An outright refusal by an employee to receive the vaccine who does not have a genuine reason for such refusal may be a legitimate basis to terminate an employee’s employment. Caution should be taken here, however, as there are a number of other considerations, including whether an employer is required to accommodate employees who refuse to be vaccinated due to disability or religious reasons, whether the employee has a contract of employment that limits the basis on which the employee’s employment can be terminated, whether the employee is covered by a collective bargaining agreement that similarly limits the grounds for discipline and termination, and whether termination for refusal to be vaccinated could be considered wrongful termination under state law.

Should employers check employees’ vaccination status before allowing them into the workplace?

Maybe

Private sector US employers may lawfully inquire into an employee’s (or applicant’s) vaccination status (except in Montana), but must be careful to limit the inquiry solely to that question, and not inquire, for example, if an employee responds that he or she is not vaccinated, with any further or additional questions concerning why the employee (or applicant) is not vaccinated, unless the employee requests a medical/disability or religious-related accommodation from any vaccination requirement, in which case, the employer can engage in an interactive discussion to obtain the necessary information to assess whether an accommodation can be reasonably provided.

Is there provision for a “vaccination passport” in the US and, if so, can employers ask employees to show that before allowing them into the workplace?


In some cases

The US has not implemented any federal-level vaccination passport programmes, and the Biden Administration has indicated that it does not intend to do so, leaving the issue to the individual states. In response, a small number of states, such as New York and Hawaii, have adopted vaccination passports as a means for individuals to confirm their vaccination status, whereas other states, for example, Florida, have passed laws forbidding state and local governments and in some cases, private businesses, from requiring proof of vaccination to access goods and services. In each case, however, these laws apply more broadly than in the employment context, and do not change the current status that in every state (except Montana), a private employer can require proof of vaccination status as a condition of employment.

Can employers refuse entry to the workplace if an employee refuses to have the vaccine?



Under the current state of the law and applicable guidance, it appears that an employer could refuse to allow employees – and, for that matter, customers, vendors, suppliers, guests and visitors – who have not been vaccinated (and presumably previously have not had COVID-19) from entering the workplace. Employers should, however, consider whether reasonable alternative arrangements, i.e. remote work or having non-vaccinated employees work elsewhere on the premises or at alternative times, can be implemented to permit employees who may have legitimate reasons for refusing to be vaccinated to continue working.

Are there data protection/privacy considerations in relation to this?



Employers need to be certain to keep both Health Insurance Portability and Accountability Act (HIPAA) and state privacy laws in mind before requiring disclosure of (or sharing) employee health information, including as relates to COVID-19 vaccinations. Although HIPAA generally does not apply to employers collecting health information in the capacity as an employer, employer-sponsored group health plans are subject to HIPAA, and there is often ambiguity regarding the function the employer is performing. For example, human resources personnel often perform both "employment" functions (not subject to HIPAA) and "group health plan" functions (subject to HIPAA). There is also a range of state privacy laws that employers must navigate. For example, the California Consumer Privacy Act (CCPA), which became effective in 2020, requires businesses to provide a formal privacy notice to consumers "at or before collection" of personal information (defined broadly). The notice must describe the information collected and how the data will be used. Other state laws regulate how "health information" can be collected and shared independently of HIPAA.

Are there any other issues that employers should consider in relation to this issue?



Employers should anticipate that regardless of whether they implement a mandatory COVID-19 vaccination requirement for employees, or are required to ensure vaccination status or require weekly testing under the forthcoming ETS, some employees will have legitimate concerns about the safety and potential side effects of a vaccine that has been developed and distributed on an extremely expedited timeline. Other employees will have concerns about being in the workplace with co-workers who may not have yet received a vaccine or who, for legitimate (or non-legitimate) reasons, decline or refuse to be vaccinated. Accordingly, a robust communication and implementation plan for any workplace COVID-19 vaccine policy will need to be developed by employers, which will take into consideration the range of anticipated employee concerns.

Is there any guidance available for employers?



The EEOC has published [guidance](#) relating to the COVID-19 pandemic. However, this guidance has not been updated since 28 May 2021 and, thus, does not address the recent actions taken by the Biden Administration under the Plan.

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